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Lander









# HISTORICAL NOTICES

## OF SCOTISH AFFAIRS,

SELECTED FROM THE MANUSCRIPTS OF

<sup>bart., Lord</sup>  
SIR JOHN LAUDER <sup>oe</sup> (OF) FOUNTAINHALL, BART., )

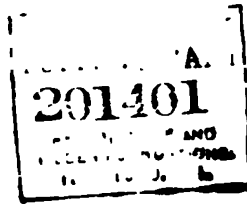
ONE OF THE SENATORS OF THE COLLEGE OF JUSTICE.

VOLUME FIRST. 1661—1683.

PRINTED AT EDINBURGH:

MDCCCXLVIII.

<sup>1P</sup> 1848  
C.C.



EDINBURGH: PRINTED BY T. CONSTABLE. PRINTER TO HER MAJESTY.

At a Meeting of the Committee of the BANNATYNE CLUB, held  
at Edinburgh, on Monday the 10th of April 1848 :—

THE SECRETARY stated, that the HISTORICAL NOTICES selected from the Manuscripts of Lord Fountainhall, were now completed to the year 1688, and extended to nearly 900 pages ; and he requested the opinion of the Committee, whether this might not form a suitable termination to the Work ; the more so, as the Manuscript Collections of a later date consist almost wholly of Reports of Decisions which have already been printed. THE COMMITTEE approved of this suggestion, and

RESOLVED, — That the HISTORICAL NOTICES OF PUBLIC AFFAIRS IN SCOTLAND, selected from the Manuscripts of SIR JOHN LAUDER OF FOUNTAINHALL, and edited by the SECRETARY, be forthwith completed in two volumes, with an Index of Names, and circulated among the Members of the Club.

*Extracted from the Minutes,*

DAVID LAING, SECRETARY.



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## PREFACE.

THE following HISTORICAL NOTICES consist of Selections from three Manuscript volumes of Decisions, collected by SIR JOHN LAUDER of Fountainhall, previously to his appointment at the Revolution as one of the Lords of Session. His collections of a subsequent date, which embrace a period of twenty years, are equally voluminous, but they do not afford the same kind of materials for illustrating the state of public affairs. "After the Revolution, (he says,<sup>1</sup>) upon my entrie to be a Judge, I continued thesse Observations, but restricted my selfe precisely to the Interlocutor, without any enlargements, in regaird President Stairs<sup>2</sup> told [me,] he was marking the Lords Decisions as he had done formerly." "In this Manuscript, (he adds,) I resolve, with God's assistance, to continue the same Observations, but with the like brevity of method with the former; and, if it ware neidfull, it ware easie for me to extend the cases at large from the parties Informations, and other helps beside me, which (God giving leasure) may be afterwards performed by me." This however Lord Fountainhall never accomplished; and it is much more to be regretted, that he should have abstained from continuing his Historical Observations during the period when he sat as a Member of

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<sup>1</sup> MS. volume in quarto, marked PP, commencing with the "Winter Session, 1692."

<sup>2</sup> Sir John Dalrymple of Stair, the most eminent of all the Scottish Lawyers, was, in April 1690, created Viscount of Stair. His "Decisions of the Lords of Council and Session," from 1661 to 1681, were published during his exile in Holland, when he had been deprived of his office of Lord President. (Edinburgh, 1683, 1687, 2 vols. folio.) Having been restored to this office after the Revolution, he died on the 25th of November 1695, in the seventy-seventh year of his age.

the Parliament of Scotland, until the Union of the Kingdoms. Lord Fountainhall survived till September 1722; and his Library, soon after his death, was sold by public auction.<sup>1</sup> Upon that occasion, his numerous manuscripts must have passed out of the possession of his descendants; and being dispersed, several of them, it is to be feared, are now irrecoverably lost.

The more important volumes of Lord Fountainhall's Decisions, extending from 1677 to 1688, and from 1695 to 1712, in five volumes folio, were acquired, probably in the way of purchase, by the Faculty of Advocates in 1733; and a plan for their publication was approved by the Curators in 1738, as will afterwards be noticed. In 1744, an intermediate volume in quarto, containing Decisions from November 1692 to February 1693, was presented to the Library by Henry Home, Lord Kames. At a later period, a volume in folio, being the earliest of the series, containing Decisions from 1649 to 1678, partly transcribed from other collections, was also acquired by the Library.

From three of these volumes, Robert Mylne,<sup>2</sup> a writer in Edinburgh, made, between 1727 and 1729, a series of extracts, interspersed with occasional remarks and corrections of his own, strongly indicative of his Jacobitical principles. From Mylne's manuscript, Sir Walter Scott

<sup>1</sup> The sale of his Library forms the subject of a letter of James Anderson's, when sending to one of his correspondents, (probably Sir James Cockburn,) "so much of the Catalogue of my Lord Fountainhall's books as is printed, which, I judge, may be about the third part of his collection. The rest will be printed this week or beginning of next week: the sale will very quickly follow." After mentioning several rare books in the collection, it is added, "If his Grace incline to have any thing that is in what I send you printed, or have hinted, which I believe will be in the sequel of the Catalogue, I intreat your advice speedily, the auction being so sudden."—(*Analecta Scotica*, vol. ii. p. 72.) The letter has no date, but it must have been at the close of 1722, or early in 1723, as it preceded the sale of Sir Robert Sibbald's Library in February 1723.—(*Ib.* vol. i. p. 159.)

<sup>2</sup> Robert Mylne was a person of very industrious habits, as is sufficiently attested by his numerous manuscripts, transcribed for his own use, with notes and corrections, generally in a very illegible hand. He survived till 21st December 1747, when he died at the age of 103. "He enjoyed his sight and the exercise of his understanding till a little before his death, and was buried on his birth-day." In the *Scots Magazine*, he is said to have reached the age of 105.

published, in 1822, a quarto volume, under the title of "Chronological Notes of Scottish Affairs, from 1680 till 1701 ; being chiefly taken from the Diary of Lord Fountainhall." Sir Walter's Introduction will be subjoined to this Preface; but we may remark, that he was mistaken in supposing Mylne to have transcribed a separate Diary of Lord Fountainhall. The first sixty-seven pages of the printed volume are merely abridged notes from the volume of "Historical Observes," 1680 to 1686 : pages 69 to 266 contain similar notes extracted from two of the volumes of Decisions, 1683 to 1688, which have been used for the present work ; and from page 267 to page 293 exhibit a few passages gleaned from the Decisions, 1695 to 1701. The interpolations and satirical remarks of the old Jacobite may have had a greater attraction in the eyes of his distinguished Editor than is apparently admitted. As these interpolations can now be distinguished by a comparison with the Author's manuscripts, nearly all of them are added, as a literary curiosity, in the Appendix.

With the view of presenting a more faithful and copious selection from Lord Fountainhall's existing manuscripts, the task was most appropriately and zealously undertaken by his lineal representative, the late SIR THOMAS DICK LAUDER, and the publication, intended to form two volumes in octavo, under the title of "Historical Notices of Scottish Affairs," had actually proceeded at press to page 304, in 1825, when the misfortunes of the publisher put a stop to the enterprise.

After an interval of several years, the greater portion of Sir Thomas's transcripts was placed at the disposal of the Bannatyne Club. The Committee having in 1836 resolved upon their publication, it was deemed advisable to change the original plan, by making the selections more extensive, with a closer adherence to the author's manuscripts ; and likewise, instead of incorporating passages from his Historical Observations with extracts from his Law Manuscripts, to publish the former as a distinct work. This was accordingly printed for the Members of the Club in 1840, under this title, "HISTORICAL OBSERVES OF MEMORABLE OCCURRENTS IN CHURCH AND STATE, FROM OCTOBER 1680, TO APRIL 1686." Unfortunately no trace has yet been discovered of the earlier volume of Historical Observations to which reference in that work is made.

In proceeding with the present publication, the task of re-collating the transcripts, and supplying such additional extracts as were marked for selection, was entrusted to Mr. DAVID MEEK, who, at a very advanced period of life, has accomplished the task, including the Index of names, with a degree of fidelity and laborious care above all praise. It was further expected that these selections would have been accompanied with a detailed Memoir of the Author's Life and Writings; but the recent death of SIR THOMAS DICK LAUDER of Fountainhall and Grange, Baronet, a gentleman distinguished by his literary attainments, has disappointed this expectation. A very brief sketch of Lord Fountainhall's Life may however not be unacceptable in this place.

JOHN LAUDER was born at Edinburgh on the 2d of August 1646. He was the eldest son of John Lauder, a merchant, or more strictly speaking a tradesman, in Edinburgh, by his second marriage, with Isabel Eleis, daughter of Alexander Eleis of Mortonhall. By way of distinction, his father is usually styled Bailie Lauder, and he is mentioned as a leading person in the magistracy of the city; but his connexion with the Town Council appears to have been limited to his holding the office of *Third* Bailie in the year 1657, and again in 1661.<sup>1</sup> His wealth and respectability may however be inferred from the circumstance of his having been proposed as a candidate for the office of Provost, in opposition to Sir Andrew Ramsay of Abbotshall, at Michaelmas 1672.<sup>2</sup> After passing through the usual course of instruction at the High School, and afterwards in the University of Edinburgh, under James Pillans, one of the regents, Lauder took his degree of Master of Arts, 18th of July 1664.<sup>3</sup> With the view of completing his education, and more particularly of prosecuting the study of the Civil Law, according to the

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<sup>1</sup> See list of Magistrates in the Historical Sketch of the Municipal Constitution of the City of Edinburgh. Edinburgh, 1826, 12mo.

<sup>2</sup> See *infra*, vol. i. p. 59.

<sup>3</sup> The Theses on that occasion, "sub præsidio Jacobi Pillans," appeared in the shape of a broadside, dedicated to Sir Andrew Ramsay, Provost, and the other Magistrates of the City.

general practice of the times, his father sent him abroad ; and the recent discovery of a manuscript journal, written during his residence in France, in 1665-66, enables us to trace his progress.

From this manuscript we learn that Lauder set out on horseback from Edinburgh on the 20th of March, 1665, and reached London on the 1st of April. Having spent six days in visiting the most remarkable objects in the Metropolis, he, along with some companions, sailed down the river to Gravesend, proceeded by post to Dover, crossed to Calais, and thence hastened to Paris.<sup>1</sup> He carried with him a bill of exchange for 400 livres, with a letter of introduction from his father to Francis Kinloch, a merchant settled in Paris. In this letter, of which he preserves a copy, dated at Edinburgh 15th March 1665, his father says, " The bearer hereof, my son, inclining to study the French tongue and the laws, I have therefore thought it expedient to direct him to you, being confident of your favour and caire, intreating your recommendation by a few lynes to ane Monsieur Ale[xander,] Professor of the Laws at Poictiers, to which place I intend he sould go : as also to place him there for his diet in the most convenient house, but especially with one of our profession and religion." He adds : " I most [must] without vanity or flattery say, hitherto he has not bein inclined to any vice or evill way, and I hope sall so continue." He was received with great kindness by Francis Kinloch, who advised him first to visit Orleans; and to one of his correspondents he introduced him as " Mr. John Lauder, whose father is my very much honoured friend, his mother my near kinswoman, and himselfe a very hopeful youth, inclined to virtue every way." On the 28th of July, eight days after he had reached Poitiers, he entered as " pensioner," or boarder, with Mons. Daillé, with whom he remained till the 24th April following. Lauder confesses, " I was beginning to feell lazy, so that if I had stayed longer in Poitiers I had always engaged in more company, and so done lesse good ; whence I have a sort of satisfaction that I came away."

We may presume that Lauder, in another note-book, continued his journal until his return to Scotland. From a very minute account of his

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<sup>1</sup> His expenses between Edinburgh and Paris he reckoned as having come to £9 sterling.

expenses, contained in the existing volume, we find that having come back to Paris, and taking the route through Cambray and Valenciennes he had visited Bruxelles and Antwerp, in his "voyage through Flanders to Holland." At Mardyke he took a boat and sailed to Rotterdam. He also mentions his having been at Campvere in July 1667; and an incidental notice in his Decisions<sup>1</sup> shows that he had spent some time at the University of Leyden. In another small memorandum-book of money received and expended from 1671, he has preserved a list of books which he had purchased during several years, with the prices, "since my returne to Scotland from travelling, which was on the 9th of November 1667."

Lauder was admitted as an Advocate on the 5th of June 1668; and he devoted himself to the duties of his profession with a degree of attention and zeal which could scarcely fail to ensure success. In the beginning of the following year, he married Janet, daughter of Sir Andrew Ramsay of Abbotshall, Provost of Edinburgh.<sup>2</sup> This alliance, we may readily suppose, proved of advantage in the way of his profession; and may have led to his appointment as one of the Assessors to the City of Edinburgh. In his note-book of expenses we find this entry:—"Upon the 20th of June 1673, I received from William Binning a year's salarie as Tounes Assessor, which he was owing me for the year 1671, wherein he was Treasurer, being 150 lb. Scots, which is about 225 merks." He had already commenced the practice—which he pursued with great diligence and assiduity for nearly half a century—to preserve a register of Decisions of the Court of Session. "From my admission as an Advocate in June 1668, I began to mark the Decisions of the Lords of Session, not only those I was employed in, (which for severall years were

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<sup>1</sup> "15th June, 1678. The University of St. Andrews acclaim to be free from paying Excise for all drink furnished to the Scholars, and that upon the general priviledge competent by custom to all Universities. I remember we enjoyed that priviledge at Leyden after our immatriculation. Yet the Act 1661, imposing the Annuity and Excise, ordains all Brewers to pay it without excepting what shall be consumed by students in Universities."

<sup>2</sup> 1669, 21st January. Mr. John Lawder, Advocate, and Janet Ramsay, married.—(*Register of Marriages, Edinburgh.*)



but few causes,<sup>1</sup>) but also others that came to my knowledge, and which Observes take up three folios to November 1688, besides many other law collections in other manuscripts, more in number than these." Notwithstanding this modest admission, he evidently had obtained considerable practice within a few years of his being called to the Bar.

In June 1674, he was one of the Advocates who were "debarred," or excluded from practising in the Court, on the ground of their asserting the right of appeal against "the Lords of Session their sentences of injustice." In August that year, he enters as having "payed for a collation I gave to Sir G. Lockhart, W. Murray, W. Pringle, &c., 8 lb ij s Scots." "Item, spent that 6 of October 1674, that I quit Edinburgh on the King's proclamation of banishment against the debarred Advocates, 29 pence." This sentence of exclusion was reversed in January 1676.<sup>2</sup> Although he cannot be said to have taken any very decided part in political affairs, Lauder appears generally to have acted along with those who opposed the measures of the Court. This was not the direct road to preferment, yet he obtained the honour of knighthood about the beginning of the year 1681, most probably through his father-in-law Sir Andrew Ramsay's interest with the Duke of Lauderdale. His reputation as a lawyer must have been considerable; and, in December 1681, we find him engaged as one of the eight leading Advocates who were employed in the celebrated trial of Archibald Earl of Argyle, accused of having signed the Test with a treasonable explanation.

Sir John Lauder was returned, along with Sir John Wedderburn of Gosford, as Member for the county of Haddington, in the Parliament which met at Edinburgh in April 1685. This afforded him an opportunity of attending more immediately to public affairs, and enhancing the importance of the Historical Notices which he has interspersed in

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<sup>1</sup> At pages 222, 223, and 230, he has specified some of the causes in which he was engaged as counsel in 1679.

<sup>2</sup> See his own notice of this event at pages 88 and 90. A more detailed account of this strong measure is given by Professor Forbes, in the Preface to his *Journal of the Session*, &c., p. xviii. Edinburgh, 1714, folio.

the earlier volumes of his Decisions. He was returned as Member for the same county in succeeding Parliaments until the Union in 1707 ; and during the reign of James the Second he honourably distinguished himself by his open and zealous attachment to the Protestant faith.

When the Revolution brought a change of Government, and a remodeling of the Court of Session and other judicatories, Sir John Lauder was raised to the bench, and took his seat with the title of LORD FOUNTAIN-HALL, on the 1st of November 1689. On the 27th of January following, he also became a Lord of Justiciary. In 1692, he declined accepting the office of Lord Advocate, from the conscientious feeling he entertained of not being able to justify the conduct of Government in regard to the barbarous massacre of Glencoe. In the later proceedings of the Scottish Parliament, on the subject of the Union with England, he was one of the "Patriots" who were in the minority, and who frequently entered their protest against the Articles of an Incorporating Union of the two Kingdoms.

We may now briefly advert to Sir John Lauder's domestic history. His lady died on the 27th of February 1686 ; and, under that date, he thus records his grief:—"At night happened *mors carissimæ meæ conjugis, mihi amarissima et luctuosissima* ;" and in the margin he adds, "*Nota, non obliviscenda.*" In the following year, however, on the 26th of March, he formed a second alliance with Marion Anderson, daughter of Anderson of Balram.<sup>1</sup> He appears to have had a numerous family, but several of his children predeceased him. His father was evidently a person of opulence, and had acquired property in different parts of the country. By his first wife<sup>2</sup> he had a daughter, who was married to

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<sup>1</sup> Balram is in the parish of Aberdour. According to some accounts, Lord Fountainhall is said to have married, for his second wife, Margaret, daughter of Sir Alexander Seton of Pitmedden. This error has originated in confounding the father and his eldest son, also named John Lauder, who married Margaret Seton, 10th August 1696. See *Scottish Elegiac Verses*, p. 189. Edinburgh, 1842, 8vo.

<sup>2</sup> In Nisbet's *MS. Genealogical Collections*, (Advocates Library,) she is called Margaret Spire or Spiers. (See *Analecta Scotica*, vol. ii. pp. 10-12.) In the Edinburgh Register of

Colin Campbell of Blytheswood. The Judge was the eldest son of the second marriage;<sup>1</sup> and his brothers-german, William and Andrew Lauder, are mentioned in the Memorial against their step-mother, in the year 1690. This was Margaret Ramsay, whom their father had married as his third wife in 1670. She was the daughter of George Ramsay of Iddington, in the county of Berwick. In an Act of Parliament in 1682, he is styled, "John Lauder of Newington, merchant burgess of Edinburgh."<sup>2</sup> In a subsequent Act of ratification of the lands and barony of Fountainhall, he appears as "John Lauder of Fountainhall," and Sir John Lauder, Advocate, is mentioned as his eldest son.<sup>3</sup> With the view of gratifying his wife's vanity and ambition, he obtained, in 1688, the honour of a baronetcy; but not satisfied with this distinction, she succeeded in having the destination of the grant appropriated to his son, George Lauder, or the heirs-male of Margaret Ramsay, his present spouse. Lord Fountainhall, conceiving that such a destination, passing over himself and his brothers of the second marriage, was unjust, obtained, on the 16th of May, an order of Privy Council, that the patent should remain in the Clerk's hands until it was rectified.<sup>4</sup> Although this was done with her husband's sanction, she nevertheless contrived, by misrepresenting his eldest son, Sir John, as disaffected to the late Government, to have the patent in favour of her son George,<sup>5</sup> passed under the Great Seal on the 17th of July 1688. Having brought an action of reduction of this patent, a new charter, conferring on John Lauder, Senior of Fountainhall, whom failing, to his eldest son, the title and dignity of a Knight Baronet, was obtained 25th

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Marriages, we find John Lauder, merchant, and Marion Skeen, were married 28th of March 1689; and on the 17th of October the same year, another person of the same name, John Lauder, merchant, was married to Elizabeth Turnbull.

<sup>1</sup> Isabella Ellis, his second wife, was alive in July 1665, when she joined her husband in granting an instrument of sasine of the lands of Yorston, in favour of Mr. Richard Lauder of Hatton, and Charles Maitland, his son-in-law.

<sup>2</sup> Acta Parl. Scot., vol. viii. pp. 568, 569.

<sup>3</sup> 16th June, 1685, ib. vol. viii. p. 568.

<sup>4</sup> See the notice at page 868.

<sup>5</sup> See *infra*, page xxxiii.

of January 1690.<sup>1</sup> The Memorial on this subject, which Lord Fountainhall prepared for the information of the Lord Advocate,<sup>2</sup> presents such a singular picture of the conduct of this "unjust step-mother," to gratify her inordinate ambition, that it has been added in the Appendix to this Preface.

The elder Sir John Lauder died at Edinburgh on the 2d of April 1692; and his death was bewailed in a copy of Latin verses by Walter Dennistoun.<sup>3</sup> Lord Fountainhall accordingly succeeded to the title of Baronet as well as to the family estates. Of the peaceful tenor of his subsequent life there is not much to relate. The records of Parliament prove his regular and zealous attention to public affairs; and the series of his Decisions continued to the end of July 1712, which show his unremitting diligence, contain a few notices of the death of his children.<sup>4</sup> The increasing infirmities of age may have occasioned his discontinuance of the reports of cases decided by the Court of Session. After the

<sup>1</sup> *Registrum Magni Sigilli*, B. 72, No. 81.

<sup>2</sup> Lord Fountainhall had evidently made some additions to this paper at a later date than 1690, as, in the last paragraph, reference is made to his father's decease, which happened in 1692.

<sup>3</sup> "In Obitum laudatissimi spectatissimique viri D. Joannis Lauder ab Aula Fontana Equitis Baroneti; qui annum agens Octogesimum secundum ex humanis decedens, ad salutis æternæ portum feliciter appulit, 2do Aprilis, 1692."—See volume of *Scottish Elegiac Verses*, pp. 84-87. Edinburgh, 1842, 8vo. In the "Collection of Miscellany Poems and Letters, by John Harvey," Edinburgh, 1726, 8vo, there is included a Latin poem, which he had addressed to the Judge, under this title, "Viro maximoque suspiciendo Domino Joanni Lauder a Fountainhall, Eq. Aurato, Summæ, apud Caledonicas, Forensis Curie Sen. digniss." It had probably been printed some years previously as a broadside or single leaf. In the same volume we find the Latin Elegy, in 1718, printed anonymously in the *Scottish Elegiac Verses*, page 189.

<sup>4</sup> Thus, on the 17th December 1695, "my dear child Robert dying this day, the Observes are the fewer, in respect of my absence for two days, and my other affairs, which diverted my constant attendance that week." Again, "21 Julij 1696, Tuesday.—My dear son William dying this day, I was absent till his buriall was over." Mr. Andrew Lauder, second son to Lord Fountainhall, was admitted an Advocate, 27th January 1703; and Mr. David Lauder, a younger son, on the 28th February 1707. (MS. List of Advocates, by Robert Mylne.)

Union he resigned his seat as one of the Commissioners of Justiciary ; his successor, John Murray of Bowhill, having been appointed on the 1st of June 1709. Sir John Lauder, having some time previously resigned his office as a Judge, died at Edinburgh on the 20th of September 1722,<sup>1</sup> and was interred in the family burial-place in the Greyfriars church-yard.<sup>2</sup>

It has already been stated that, a few years after his death, the most

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<sup>1</sup> His son Andrew, (see note 4, p. xviii,) who afterwards succeeded to the title of Baronet, married Isabella, only child and heiress of William Dick of Grange. From Lord Fountainhall's confirmed Testament, recorded 18th September 1723, it would seem that he had previously made a disposition of his property to his children ; as it relates chiefly to the assignment of a bond for 2000 merks, granted in favour of Magdalene Scott, the daughter of Thomas Scott of Milleny, dated, "At Edinburgh this 28th March 1722." It also contains the following very characteristic notice :—"A father in distributing his means among his children is not tyed to the precise neicitys of form : It being enough that his intention and design be clear. By the common law a Testament *inter liberos* had many priviledges : In my practise, both as a lawyer and when a Judge, I ever preferred matter to forms ; and the large extension of clause (tho' in other caices usefull) was both unnecessary among children, and very tedious and wearysome to me who wrote all with my own hand : And friends will sufficiently see what I have designed every one is to gett, which I [pray] God to bless them. And this I thought fitt to declair and explain."

<sup>2</sup> The following notice of Lord Fountainhall's death occurs in the *Caledonian Mercury* for Monday, September 24, 1722 :—

"Thursday last died Sir John Lauder of Fountainhall, Baronet, one of the Lords of the Session—a gentleman famed for his skill and knowledge, not only in the Civil Law, but in the laws of his country, in which science he has been surpassed by few, and in equity and justice by none. He was likewise, till the Union, one of the Lords of the Justice or Criminal Court, and one of the Lords of Privy Council and Exchequer, and Member of Parliament from K. Charles's II. reign to the above-mentioned Union, which he strenuously opposed ; and in the former reigns he was a bold asserter of the Protestant religion and the liberties of his country ; in all which stations he demeaned and carried himself without the least tach or blemish, &c. As he was a gentleman eminently learned, especially in the law, which will probably afterwards be seen by his writings, so likewise he was a gentleman of extreme moderation and modesty to all who differed from him in opinion. This character of that learned and worthy gentleman is what his country in justice will allow him, and which is not easy for an ordinary pen to express, and would surpass the bounds of this paper.

"This learned person and worthy patriot was interred in his burial-place in the New Grey-Friars Church. Aged 76."

important volumes of Lord Fountainhall's Decisions came into the possession of the Faculty of Advocates. The Librarian, the learned Thomas Ruddiman, on the 3d of January 1738, submitted to the curators a proposal for printing those Decisions at his own expense; and the plan being approved, a committee was appointed "to revise the said Decisions, in order to the printing thereof." A transcript of the MSS. so revised is still preserved, having probably been made for that purpose, but the plan was not carried into effect. At length, on the 9th of March 1757, Messrs. Hamilton and Balfour, booksellers, represented to the Faculty that they were about to print the Decisions of the Lords of Session, collected by the late Sir John Lauder, Lord Fountainhall, and requested the use of the original manuscripts.<sup>1</sup> This request was granted; but some doubt being entertained respecting the propriety of publishing his "Historical Anecdotes, foreign to the purpose of the Decisions, which might give offence, as they contained some reflexions upon divers persons of these times," a committee was appointed, consisting of Sir David Dalrymple, Mr. George Cockburn, and Mr. William Wallace Junior, "to inspect and direct the publication of these Decisions."

That this committee were at the pains of revising the work, and striking out occasional passages which seemed to reflect on particular individuals, and the motives which frequently actuated the Judges in their procedure, at least during the reigns of Charles the Second and his successor James, is highly probable. Such passages, however, are not the least valuable and curious in his Decisions as illustrative of the history of the times; and his manuscripts have been carefully collated, in the view of restoring what had thus been suppressed. In making the selections, it was no easy task to form any definite plan, as so much must depend upon individual opinion. Along with such cases as are contained in the printed collection of Decisions, from 1678 to 1688, as seemed

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<sup>1</sup> A collection of "Informations," or what are usually called Session Papers, consisting of several very thick volumes in folio, (chiefly in manuscript,) are preserved in the Advocates Library, and appear, from the Minutes of the Curators, to have been presented at different times by Lord Fountainhall.

to belong to general history, it was judged expedient to include not only whatever articles had remained unpublished, but the whole of the proceedings of the Criminal Court and of the Privy Council which were recorded in his manuscripts during that period. The present Selections terminate with the year 1688. Three memorandum-books in which Lord Fountainhall inserted his Notes of Decisions, from November 1689 to November 1692, have not been preserved. Those of a subsequent date, commencing with the Winter Session 1692 to the end of July 1712, are of considerable bulk; but not being intermixed with historical notices or remarks, they contain comparatively little to interest a modern reader, and they have been very fully printed in the two volumes of Decisions.<sup>1</sup> If at any subsequent time some of his missing MSS. should be discovered, another volume of Selections, to include his early Journal, and extracts from his smaller note-books, might not be undeserving the attention of THE BANNATYNE CLUB.

On the literary or judicial character of Lord Fountainhall, it is unnecessary to enlarge. One of his contemporaries says of him—"The publick and private character of this excellent Judge are now so well known, that I need say no more of him, than that he signalized himself as a good patriot and true Protestant, in the Parliament of 1686, in defence of the Penal Laws against Popery. This self-denied man hath taken no less pains to shun places that were in his offer, than some others have been at to get into preferment: Witness his refusing to accept a patent

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<sup>1</sup> This work, which appeared at Edinburgh, 1759 and 1761, in 2 vols. folio, was announced in the newspapers of the day as preparing for publication under the authority of the Faculty of Advocates. It bears the following title:—"THE DECISIONS OF THE LORDS OF COUNCIL AND SESSION, from June 6th 1678, to July 30th 1712. Collected by the Honourable SIR JOHN LAUDER OF FOUNTAINHALL, one of the Senators of the College of Justice. Volume I. Containing also the Transactions of the Privy Council, of the Criminal Court, and Court of Exchequer, and interspersed with a variety of Historical Facts and many curious Anecdotes. Published from the Original Manuscript, in the Library of the Faculty of Advocates, at their Desire. EDINBURGH: Printed for G. Hamilton and J. Balfour. M.DCC.LIX." Pp. 880. The Editor's name is not mentioned, and the volume contains no prefatory matter. Volume II. bears a similar title, with the date "M.DCC.LXI." Pp. 790.

in the year 1692 to be King's Advocate, and the resigning his place of a Lord of Justiciary after the Union, which her Majesty with reluctance took off his hand. In short, his Lordship is (what I know by experience) as communicative as he is universally learned and knowing. He hath observed the Decisions of the Session from November 1689, till November 1712: Which I have seen in Manuscript: but his excessive modesty can't be prevailed on to make them publick."<sup>1</sup>

Lord Woodhouselee has pronounced the following eulogium, which may also be quoted, as conveying a brief but just character of the author:—"Sir John Lauder of Fountainhall was a profound lawyer, and a man of considerable learning and knowledge of human nature; having read much, and studied the character of mankind. As a Judge, he applied himself with indefatigable assiduity to the discharge of his official duties; and has left a very honourable memorial of his talents and industry in his Collection of Decisions, which record the proceedings of the Court of Session from 1678 to 1712, and incidentally note the transactions of the Privy Council of Scotland, with those of the Courts of Justiciary and Exchequer—a work compiled with so pleasing a mixture of the anecdotes of the times, and so much characteristic ingenuity of observation, as to render its perusal agreeable, even to the general reader, and valuable to the historian, independent of its utility to the professional lawyer."<sup>2</sup>

*August 1848.*

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<sup>1</sup> Preface to the "Journal of the Session, containing the Decisions of the Lords of Council and Session," by William Forbes, Advocate, Professor of Law in the University of Glasgow: p. xliv. Edinburgh, 1714, folio.

<sup>2</sup> Life of Henry Home, Lord Kames, vol. i. p. 44, 8vo edit.



# APPENDIX.

## NO. I.

### SIR WALTER SCOTT'S INTRODUCTION TO LORD FOUNTAINHALL'S CHRONOLOGICAL NOTES OF SCOTTISH AFFAIRS

THE original of the following Chronological Notes is a small duodecimo Manuscript volume, preserved in the Advocates' Library, and commonly called Lord Fountainhall's Diary. It is superfluous to make any remarks on the life or character of that eminent lawyer and upright man, Sir John Lauder of Fountainhall, as the public have been encouraged to expect a full and authentic account of him from his heir and representative, Sir Thomas Lauder Dick. It is only necessary here to observe, that he was a constant, close, and singularly impartial observer of the remarkable events of his time; and, while his rank and character gave him access to the best information, he displayed much shrewdness in digesting it, and appears to have had the habit of committing most remarkable particulars to writing. Besides the voluminous collection of his reported Decisions, of which two close printed folio volumes are but an imperfect extract, this learned lawyer was in the constant custom of registering in his note-books the events of his time, of which the following pages form an example.

It is to be regretted, that we do not find the Diary in the condition in which it was left by Lord Fountainhall;<sup>1</sup> but it appears, after his death, to have fallen into the hands of Mr. Milne, Writer in Edinburgh, who erased some passages, inserted others, and interpolated the whole—sometimes with the purpose of elucidating, sometimes with that of correcting the text—with such perverse assiduity, that, after many endeavours to that effect, it was found impossible to separate them, without destroying the sense of the whole work; so that the Editor, like Martin in the Tale of a

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<sup>1</sup> [See *supra*, p. xi.]

Tub, was compelled to desist from his intended work of reformation, in consequence of the corruptions having been so closely and inseparably interwoven with the text, that it was scarce possible to obliterate the former without destroying the latter. In general it may be observed, that Lord Fountainhall, who was created a Judge in the year succeeding the Revolution, was a sincere friend to the principles which brought about that great event, although he appears not to have been a violent party-man, either in politics or religion. Mr. Milne, on the contrary, was a violent Jacobite, and most of his interpolations go to express his partial feelings in that character. The Editor has marked several of these passages by a note, where the sentiments or prejudices of Mr. Milne seem peculiarly intrusive.

Of Mr. Milne<sup>1</sup> the Editor knows nothing, except that he seems to have followed the profession of a writer, and to have been related to Sir Robert Milne of Barnton, mentioned pp. 198 and 231, then a man of influence, and concerned with the revenues of the city of Edinburgh. The Diary seems to have fallen into Milne's hands after Lord Fountainhall's death in 1724; and it is but fair to him to state, that he appears to have had no purpose of passing his alterations for a part of the text, but only that of correcting and adding to it in his own name. His remarks are sometimes both shrewd and sarcastic; and though they may be considered as impairing the historical authenticity of the work, they rather add to than diminish its interest as a picture of the times.

About the time of the Revolution, Sir John Lauder seems to have fallen under the suspicion of the higher powers. Both his *servants* (a phrase which probably means his clerks) were arrested,<sup>2</sup> and he seems to have discontinued his Diary. Nevertheless he appears to have kept such notes as enabled him to draw up a curious account of that remarkable transaction, which is now in the Advocates' Collection, and which the Editor may one day give to the public, unless it be presented to them by some abler hand.

ABBOTSFORD, 7th March 1822.

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<sup>1</sup> [See *supra*, p. x, note 2.]

<sup>2</sup> [At page 719, this is said to have been on the 1st of May 1686. In his *Historical Observes*, page 249, Lauder says, in April, when adding, evidently at a later date, the explanation of his having discontinued his "Historic Remarks till the Revolution."]

## NO. II.

INTERPOLATIONS BY ROBERT MYLNE IN HIS EXTRACTS FROM  
FOUNTAINHALL'S MANUSCRIPTS, AS PUBLISHED BY  
SIR WALTER SCOTT IN 1822.

[*The passages printed in Italic types contain Mylne's additions.*]

## I.

IN THE VOLUME OF HISTORICAL OBSERVES, 1680-1686 : PUBLISHED IN 1840.

Page 12, line 18. "In November 1680, Mr. James Lundie, &c., some thought the Bishop was displeased with the freedome he sundry tymes used. *It was thought because Paterson, the Bishop of Edinburgh, took umbrage at his freedom of speech in the pulpit anent the Government.*"

Page 44, line 27. "He (the Duke of Rothes) gave himself great liberties in all sorts of pleasure and debaucherie, *particularly with Lady Ann, sister to the first Duke of Gordon, whom he took along with him in his progress through the country, with hat and feather,* and by his bad example infected many of the nobility and gentry."

Page 62. "Count Coningsmark, a Swede, *(who cockled King George of Hanover, after King of Brittain by usurpation, and was murdered by him,)* hyred several rogues to murder Squire Thyne," &c.

Page 74, line 14. "and got all from him (the Duke of Lauderdale) she (the Duchess) could expect, *and was glad to be quyt of him.*"

Page 115, line 30. "Mistress Euphame Scot, *(after Lady Eyemouth, and spouse to Wynram of Eyemouth, who is now broken, and she dead,)* with whom," &c.

Page 130, line 19. "he had obtained a gift from the King out of that fyne for £16,000 sterling, *whereof his heirs never got a groat to this day,* (1729,) albeit he transacted it for the half."

Page 146, line 19. "had very near shot Douglas himself dead, had not the Whig's carabine misgiven, *(the more pitie, considering what a vile traitor the Collonell efter proved to King James the Seventh.)*"

Page 158. The King and Queen's coronation.—"Nota.—*The Crown of Scotland is not the ancient one, but one cast of new by King James the Fifth.*"

Page 176, line 14. "the Prince of Orange *offering* to ship the three Scots regiments for his Majestie's assistance, (*which he, like a villain, as the Dutch, his masters, wes.*")

Page 181, line 3. "fyre a pistol or two at them, (for he had three on him.) —*he fired a pistoll at them, for he had three on him, whereof I have two, which I got from his son-in-law, the second Marquis of Lothian.*"

Page 181, line 13. "he fell in the river, (*here the curses of his many creditors whom he defrauded are brought to remembrance,*) and in the fall cryed, Ah, the unfortunate Argyle."

Page 182. Collonell John Ayloff.—"*He dyed composedly, and prayed for the King, about September or October 1685. He is not put into the Whigs' Martyrologia, because he prayed for the King.*"

Page 190, line 25. "that he (Argyle) would ruin all, &c.—*James Stewart, that arrant rogue, (after Advocate to Queen Ann,) son of that nefarious villain, Sir James Stewart, sometyme Provost of Edinburgh, a bitter enemy, (in conjunction with the Marquis of Argyle,) said, this Argyle would ruin all in his going to the Highlands with his ships and forces, whereas he should have landit in Galloway. Stewart was to come with him, but when he understood he was to land in the Highlands, he refused to accomanie him.*"

Page 190, last line. "An English widow in Amsterdam, called Mrs. Smith. *Quæritur, Whether or not this was the widow that Burnet, Bishop of Sarum, married?*" [Sir Walter Scott adds this note.—"This malicious query, which Mr. Milne has inserted, may be safely answered in the negative. Burnet married Mrs. Mary Scott, a Dutch woman, but descended of an honourable Scottish family."]

Page 196, line 7. "one of his grandchildren, *eldest son of Lord Lorne, after Duke of Argyle.*"

Page 210, line 2. "purge her therof. *The Prince of Orange prompted him (the Duke of Monmouth) to come over, that he might fall in the expedition, and thereby make way to his usurpation to the Crown of England, which he knew he could never obtain while he lived.*"

Page 211, line 4. "The Bishop of Winchester. *His name was Peter Mew; he dyed 9th November 1706, aged 89.*"

Page 216, lines 5 and 6. "Particularlie, Leslie Earle of Leven, Leslie Lord Newark, *neither of them have left any heirs male, and both of their estates near gone; Lieutenant-General Holburne, whose estate is quite sunk; Montgomerie, extinct; Monmouth, beheadit; Monro, Drummond, extinct.*"

Page 244, line 11. "The Chancellor married Lady Mary Gordon, relict of Urquhart of Meldrum, *his last wife, daughter of Drummond of Machanie, having dyed in September 1685*; whereupon Earl Middleton made a satyre shewing that the Chancellor and his brother Melfort were the truest to their whores, (*for it was said the Chancellor lay with Meldrum's wife, and his brother with* [here is a blank in Mylne's MS.], *both whom they after married,*) and falsest to their God."

## II.

## IN VOLUME SECOND OF THE PRESENT HISTORICAL NOTICES.

Page 481, line 14. "The Chancellor opposed it, alledging, he way-laid him, (*which was true,*) and then proditoriously murdered him."

Page 488, line 5. "when stobbed (*sticked*) in August 1679, by his wife Christian Hamilton, (*his first ladie's neice,*) relict of Mr. Nimmo, *sometyme Collector of Aberdeen.*"

Page 489, line 21. "Nota.—*His* (James Lord Forrester) *voting at the election of the Commissioners for Stirlineshire, was a passing from his Peerage.*"

Page 498, line 2. "James Hamilton (*he was efter Lord Pitcaitland.*)"

Page 501, line 20. "they had offers of their lives, but ware so foolishly pertinacious as to refuse it.—*They were offered their lives, but refused the same, being ingrained Whigs.*"

Page 520. [No. 198. March 12, 1684. "Duke Hamilton's action of non-entry against John Eleis, for his lands of Eleiston." See this case in the printed Decisions, vol. i. p. 280.] "Duke Hamilton obtains a decreet against Mr. John Ellies of Ellieston, for the lands of Ellieston being in non-entry. And Mr. John had gotten from the Usurper, charter and saising, when the estate of Hamilton was sequestrate, could not defend him against the nonentry. Nota.—*It was talked that Mr. John Anderson, Writer to the Signet, who marryed Ellies' daughter, betrayed his father-in-law to the Duke for filthie lucre, which is all gone; and hes litle peace with his wife and children.*"

Page 520, line 23. "York had a very bad opinion of him, [Sir Hugh Campbell of Cessnock,] and suspected (*not without good grounds*) he was upon the late English phanatique plot."

Page 521, line 26-27. "forfaultor of Hugh Campbell of Ceanock. *I believe he was reallie guiltie.*" [The following remark is added upon this by Sir Walter Scott:—"The trial of Campbell of Cesnock was one of the most infamous proceedings of the period; the court drawing forward every thing that could make against the accused. The note subjoined is that of Milne, and in his usual style of partiality."]

Page 542, line 7. "Colonell James Douglas, &c., *he after proved an arrant traitor to King James the Seventh; and his memorie is cut off.*"

Page 579, line 4. "*The Councill* thought it reasonable, but *Queensberry*, the Treasurer, *opposed it; and he was in the right for so doing, alleging,*" &c.

Page 594, line 18. "his marrying *Sir Archibald Johnston of Warriston, that arch-traytor*, his daughter."

Page 595, line 5-6. "*He was brought down in a ship, with many other traytors, 14th November 1684.*"

Page 617, line 23. "The Privy Counsell commissionats Lord Drumlanrick, son to the Treasurer, *who efter proved a vile tratour.*" . . . line 27. "*faltered in the delivery of his speech to the King; but failed after more grosslie in his villanous betraying his Master, when forced to abdicate his Crown, for which he made a most ignominious exit, having died of vermine, July 11, 1711.*"

Page 688, line 11. "The Earle of Perth, Chancellor, arrived at Edinburgh, having come post from London with Claverhouse, Balcarhouse, &c. *Nota.—There is no word of Claverhouse since the 16th Aprile 1685, either as being against Argyle in his invasion, or otherwise. But, no doubt, when he was at Court, he has been active against Queensberry; and it's probable, being at England, he might have been at Monmouth's rebellion.*"

Page 704, line 12. "The King's Advocate, (Mackenzie,) seiming to despise the similie, the Chancellor took it very hot, as a contempt. *So from this the Advocat's fall is intended, because he would not be for taking off the Penal statutes; and makes way for introduction in his post, that arch-traytor, Sir John Dalrymple, who was felo de se the very same night he had a great hand in closing the hellish Union of the two Kingdoms, in 1707.*"

Page 704, line 18. "Duke Hamilton and the King's Advocat (Mackenzie) falling hot, the Duke rudely threatened to cause crop his ears, tho' he was ane Officer of State. *Here this cowardly Duke, perceiving the Advocat's apparent fall, and with him his great enemy Queensberry, Theasurer, baselie insults him, albeit he was the brightest man in the nation.*"

Page 709, line 18. "John Weir of Newton, (*who was an arrant Whigg rogue.*)"

Page 713, line 3. "Thus fell a great proud man, (Queensberry,) little regrated. *This has been minded by Queensberry his son and brother after the Revolution, the last two having turned egregious traitors to King James VII., and betrayers of him and his intrest.*"

Page 715, line 12. "*This was cajolling him (Queensberry) to serve his interest in Parliament.*"

Page 723, line 9. "The King's letters are read, laying aside *the admirable Sir George Mackenzie*, the King's Advocat, *because he was against taking off the Penal Laws*; . . . line 11. and Sir William Bruce (*it seems the last has turned malcontent, because he got not the Mint, which was given to Lord Maitland.*")

Page 726, line 2. "Ramsay, Bishop of Ross, (*whose sister Provost Milne had married, a creature of Duke Hamilton's, and as Dr. Bruce (Bishop of Dunkeld) was of Sir William Bruce's, who was sore dissatisfied for being disappointed of the Mint.*)"

Page 728, line 4. "that Sir George Lockhart, President, officiat as King's Advocat, *in place of the admirable Sir George Mackenzie, laid aside as above.*"

Page 742, line 22. "for defamation, (*for which he wanted not reason.*)"

Page 744, line 18. "the Lord Lorne, for paying his annuity, (*having turned Popish.*)"

Page 759, line 5. "But the third carried it, viz., Sir Robert Milne of Barneton, George Hamilton, a collector, to whom Barneton had sold his lands of Binny and Blaikburne, *and after, his lands of Barntown; albeit he had bein Hamilton his raiser, by first geting him into the troop of Guards, furnishing horse, armes, &c., then making him a surveyer, thence collector at Glasgow, where he collected money wrongously, not entering the goods in the books, but putting the money in his own pocket; yet nothing would satisfy him but to have all the raiser's lands and estates, and at the last forced for sanctuary to Holyroodhouse Abbey. But at last this Hamilton, for this maltreatment of Sir Robert Mylne, before his death (which happened 26th October 1726) was a common begger on the streets of Edinburgh himself frae gentlemen; and after his death, his lady, who was as proud as Lucifer himself, and a great phanatick, turned Papist for bread. She was daughter of Sir James Balfour of Denmill.*"

- Page 766, line 3. "One Gordon, &c.—*Mr. Thomas Gordon (son to Boig-holl) made Professor of the Oriental Tongues in the Collodge of Glasgow, &c. In 1689, he discovered King James's letters, that he brought frae him out of Ireland, to the government.*"
- Page 772, line 20. "Sir John Dalrymple, *that treacherous knave.*"
- Page 774. "Adam Scot, &c. [Decisions, vol. i. p. 441.] *I judge he was the Advocate's Bar Keeper, and concerned in Musselburgh Milns.*"
- Page 792, line 28. "Doctor Gilbert Burnet, *(a notorious rogue, who had been undermining the King, as also his brother King Charles II., at severall foreign Courts.)*"
- Page 807, line 2. "Nota.—*He was said after to be felo de se.*"
- Page 809, line 1. "demolished in the Rebellion, as they called our Reformation, *which, in effect was no less than a deformation, by casting down many religious places.*"
- Page 815, line 30. "Mistress Anne Gilmor, daughter of unquhile Sir John Gilmor, sometime President of the Session, *(who wes got with child by Lord Ross; the child being a lass, and is living 1729,) she was brought to-bed in the Highlands; but she denyed the lass to be hers, (albeit most true,) raised criminal letters against Kat Lichtone, spous to Henry St. Clair of Larvig, for defaming her in her chastitie. Cockburne raised a recrimination against her for reatortes, &c. The affair was agreed befor furder heiring, 26th August 1687.*"
- Page 816, line 25. "The Master of Balmerino, *(who had a Miss called Jean Gray.)*"
- Page 819, last line. "No doubt there hes been humor betwixt Arran and Mel-fort, *that has given rise to this report, Arran being the Court Hector then.*"
- Page 828. "The Dutchess of Lauderdale [see the case in Decisions, vol. i. p. 480, which Mylne thus abridges:] pursues the Earle for ane absolviter from the Duke's English debt. He alleadges she wrott letters to Murray of Glendoig, late Register, that she should pay the samen; which letters Hugh Ross, Glendoig's servant, took out amongst his papers, and offered them to the Earle for 1000 merks. But the Dutchess hearing thereof, sent for Ross, *(with whom she had formerly casten out,) and offered him more; whereupon he gave her up the letters, (which would have clearly proved her perjured,) and, in place of giving him any money, [she] burnt the letters, and caused him to be beat down stairs by her servants. I myself borrowed the money at Sir Robert*



*Mylne's desyre, which Ross should hae gotten from Lauderdale, and brought the same to the Earle; but they hade lett Ross go away before I came with the money, albeit I stayed not three quarters of ane hour; and it was thought Sir John Dalrymple had treacherously past down to the Dutchess, and caused her send for Ross; and Ross was imprisoned for trincating and falshood to both. 18th November 1687."*

Page 834, line 4. "were on the scaffold, (*this I, Robert Mylne, writer, saw with my own eyes.*) . . . . *Some alleaged his mother was concerned in the murder, and that he had lyen with her himself.*"

Page 836, line 24. "*This was done by influence of Lockhart, President, on account Aberdeen had married his relation.*"

Page 842, line 21. "that James Steuart, (*that treacherous villain, as his father was.*) *called Sir James Steuart, Provost of Edinburgh, (the time of his rebellion against King Charles First,*) had used."

Page 847, line 6. "James Stuart, *the rogue.*"

Page 848, line 4. "I went to Fyffe to Abbotshall's buriall," &c. [Mylne alters this as follows:—] "Sir Andrew Ramsay of Abbotshall, some time Provost of Edinburgh, Lord of Session, dyed 17th January 1688, at Abbotshall, where he was buried. *Sir John Lauder of Fountainhall married a daughter of his to his first Lady.*"

Page 850, line 10. "(the Queen) being oft tymes six houres on her knees at prayers altogether; (*a great lie, she being so [too] much tane up with Court affairs to have so long tyme for private devotion.*")

Page 862, line 18. "Corstorphin (*Lord Forrester*) raised ane reerimination against Mr. George, that in the year 1679, (*in which year the Lord Forrester's father was killed by his Lady, who was his first Lady's neice, and daughter of Hamilton of Grange, and relict of ane Nimmo, a Collector, for which she was, upon 12th November 1679, heheaded,*) when this King was here."

Page 866, line 10. "Leivetennant Collonell James Murray, (*who, I judge, had a post in the Castle of Edinburgh.*")

Page 868, line 5. "His Majesty conferred the places of H Marcus and Edmeston, in the Session, upon Mr. Alexander Swintoun of Mersington,<sup>1</sup> and Lewes Gordoun of Auchentoull, divydeing his favours

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<sup>1</sup> "Lord Mersington was a younger brother of the Swinton family. Balcarras calls him the fanatic judge; and, in addition to the equipage here described, says he was 'as drunk as ale and brandy could make him.'"—[*Note by Sir Walter Scott.*]

betuixt the Presbyterian and the Papist; and Lord Balcaskie (*Tarbel's son-in-law*) got Marcus his place in the Criminall Court; and it's observable that Mersington headit the rabble which attacked the Abbey on the unhallowed Revolution, and had a great broad belt about his middle, and a pole-ax in his hand. There was a woman also, who had born a child to him in adultery, was execute therefore. And he was in company at Leith with Mr. Scott, Sherif-Clerk of Edinburgh, who, in their up-coming, slew one Philip Alexander, in St. Andrews, a pur-blind man, 1699, for which Scott is remitted, 1704; but he being forced to flee in the interim, Alexander Belshes, brother to the Laird of Tofts, got his place, Sherrif-Clerk of Edinburgh, for his behoof; but after trickt him out therof, and kept it to himself, which broke Scott's heart. Belshes of Tofts married one of the daughters of Mersington, who is long agoe broken; and Swinton of Lochlan another; and a third married Bruce of Kennet, who, with his drunken billies, insulted the Town-Guard of Edinburgh, and killed three of them, viz., Henry Linkletter, Alexander Simson, and Colin Campbell, for which he has a remission on 2d May 1691. He killed them upon the 4th May 1690. Mersington had another daughter married to Sir Alexander Cumine of Culter, also dead and broken; another to the rake and egregious cheat Charters, who has only a daughter, married to the Earle of Weyms. Lord Mersington, he had two or three sons, whereof [is] no memorie. He acquired Mersington, *vis et modis*, from the true heir thereof, Ker of Mersington, and it's gone from him. (His Lady was Alison Skeen, oldest sister of the last Halyeards, whose mother was daughter of the said Ker of Mersington.) The Lord Mersington died suddenly on 21st July 1700, his Lady having found him dead in his bed when she awaked in the morning."

Page 873, line 15. "James Stewart, *that treacherous traytor*, was adjoyned;" and page 875, line 27; "James Stewart, *that egregious villain*."

Page 884, line 6. "yet, by the Prince of Orange's arrivall then in England —yet, by the unnatural usurpation of the Prince of Orange, no business was done, save *delyverances* on a few bills."

"The King was forced to abdicat his kingdomes by the foresaid Usurpation. The King of France before fully informed him thereof, and offered to send forces to his assistance, which he refused, (the greater fool he!) not believing his subjects would have joined the Usurper. (See Fergusson's *History of the Revolution*, in laigh press, p. 18.)"

## NO. III.

MEMORANDUM FOR SIR JOHN LAUDER.<sup>1</sup>

To raise ane libel at Privy Council at the instance of Sir J. D[alrymple,] his Majestie's Advocate, for, &c., and of Sir John Lauder, Mr. William and Andrew Lauders, his brothers-german, against Margaret Ramsay, their step-mother, George Ramsay of Idington, her father, Doctor Robert Trotter, her brother-in-law, and their wives, and J[ohn] L[auder], husband to the said M. R., &c., for their interesses, making mention and complaining, that, albeit by the laws of God, Nature, and Nations, it be ane crime of ane high nature for ane Wife by herself, or her friends, insolently and imperiously to abuse and overawe her Husband, and by presumptuous force and mastery to impose things upon him downright contrary to his honour and inclinations; and that the defaming and oppressing of his Majesty's leidges, and the sowing discord betwixt parents and children, and the robbing persons of their birth-right, and the depriving husbands of the free disposal of the properties and the liberties of their persons, are crimes by all laws, divine and humane, highly punishable:—

Yet true it is, that albeit John Lauder of Fountainhall bath lived to ane great age, and born several honourable offices in the public, and gained reputation from all degrees of persons during the whole tract of his life, and that the complainers, his children of the first marriage, had never done anything to merit his displeasure, nor unworthy in itself, but had carried always dutifully and obediently to him; yet the said Margaret Ramsay, his present wife, has done what in her lay to tarnish and blacken, now in his old age, that honor and reputation he had so justly gathered, by stirring him up *delinimentis novercalibus* against the complainers, descended of his own bowels, in so far as shee, having wearied him by her incessant importunity and ambition for many years, to procure and accept ane Knight Baronet's patent,

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<sup>1</sup> Copied from the original in Lord Fountainhall's hand-writing in the possession of the late Sir T. D. LAUDER. The paper is marked on the back by Lord Fountainhall as follows:—"MEMORANDUM FOR SIR JOHN LAUDER ANENT THE PATENT, AND ALSO FOR A LIBEL AGAINST, &c., 1690."

and he never imagining that it was to be taken in any other terms but in favours of himself and the complainers, his heirs-male, yet by the fraudulent assistance of the said George Ramsay and Doctor Trotter, she caused frame the said patent to descend after her husband's decease to George Lauder, her son of the second marriage, a child who as he can have done nothing as yet to merit it, so has no estate requisite for supporting such ane dignity, (all that is provided to the whole children of the marriage being but fifty thousand merks;) albeit the Mother resolved to sacrifice the other five children for aggrandizing him, yet the whole is no competency as such ane honor requires; and so soon as the said John Lauder understood this cheating contrivance of his wife and her friends, he did openly declare his dissent thereto, and gave the complainer ane declaration under his hand disclaiming the same, and appointing a new patent to be obtained, running in the natural channel of his lineal heirs: and her relations above mentioned were so ashamed of what was done, that they declared, in presence of many famous witnesses, that it was [most] reasonable it should be altered, and swore horrid oaths they should never oppose the same: Notwithstanding of all which, the said Margaret Ramsay, without any regard to her husband's honour and inclination, so frequently reiterated both by word and writing, and fully resolved to have that patent to descend to her son, whatever it should cost; she came to the house of Mr. Robert Lauder (in whose hands the said patent was put in order to be rectified) in the month of May 1688, at eleven o'clock of night, with several other of her accomplices, intending by force to have taken the patent from him, and threatening to see his heart's blood if he did not deliver it presently; and tho' by order of Privy Council, to prevent their violent courses, it was ordained to be put in the Clerk's hands<sup>1</sup> till the affair were heard; yet in open affront and contempt of the Council's authority, she procured ane new patent from Court, by misrepresenting the complainer as ane enemy to the late King James, and that therefore any honour bestowed upon his Father ought not to descend to him: and so high did her malice run, that she made the conception of the patent to terminate on her four sons, though there was never ane patent but it fell to all the sons of the first person, failing of one always to the other; and to fright her Husband to comply with her unreasonable and unjust demands, she threatened that she would starve herself if that

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<sup>1</sup> See the notice to this effect at page 868.

patent was not taken to her Son, and that she would kill herself if even she saw any of the complainers come near their house; and if he did not absolutely discharge them his presence, most wickedly projecting by this means to effectuate her covetous designs of ingrossing all her Husband's estate, and of obtaining contradictory and dishonourable papers from him, that for peace sake he might declare in favours of her Son, and so working upon his tenderness that she might not put violent hands in herself, nor execute these dreadful threats she had uttered in her frantic transports. And when the Earl of Lauderdale and others had come to the said John Lauder to speak in behalf of the complainers, and that he had told him that he could not but love his children of the first marriage, for they had never disoblged him, and that he was convinced it was most unreasonable to rob them of their primogeniture, and cast ane blot of infamy on them without any cause, she was so enraged at this fatherly declaration, that she tore the clothes of her body, and the hoods of her head, and swore fearful oaths that she would drown herself and her children, and frequently cursed the complainers, and defamed and traduced them in all places, and threatened that she hoped to live to see them all rooted out, they and their posterity, of the face of the earth, and her children would succeed to all; and she studied by all the diabolical wits that feminine malice could inspire to alienat the said John Lauder's affection from his children, and to sow discord and division betwixt them, and by dread and terror to fright him from converse with them, tho' that be the greatest satisfaction of aged parents: And when she could not get them absolutely debarred from paying that natural respect and duty they owed to their father, yet to render the converse and freedom altogether ineffectual, and to make him ane close prisoner, she constantly intruded herself in the room, that she might hear all that passed, and block up all information of her tricks from coming to his ears, and refused to remove when her husband bade her, but most imperiously, insolently, and impudently, followed him to other rooms, where he retired to shun her, depriving him of that natural liberty and freedom every man ought to enjoy in his own house, wherein all lawful things as he had the power of commanding, so it was her duty to obtemper and obey, seeing by the law of God and the statutes of this land, the husband is lord, head, and ruler over his wife; and it was a subverting the law of nature in her for to assume the government and power over her husband, and to preclude him from all means of knowing the truth, besieging, disquieting, and mo-

lesting him perpetually with lies of his dutiful children, to that light that it made him oft declare with much sorrow, that her carriage made him weary of his life, knowing that the easiest way to compass her hellish design was to debar the complainers from paying the natural duty to their father, and then to misrepresent them, and incense and stir him up against them, she and her friends having access at all hours, and dividing themselves, so that he should never be without one or other of them as an spy and sentry, thereby they had opportunities of instilling into him what they pleased, and particularly that all his estate was little enough to bestow upon her son, who was to succeed him in the title of knight-baronet; whereas the laws of all nations hath, for securing husbands against such imperious women, declared all donations made by husbands to wives revocable, and which in no case was never more necessary than here, the said John Lauder being more liable than any man to their wicked and unjust suggestions, he being of a great age, and one who came not abroad out of his own house, and so is continually obnoxious and liable to their villanious threats and impressions, whereas all men should be left free in the disposal of their own; and the common law hath declared imposing in this case punishable with the forfaulter and omission of what was so fraudulently acquired, and made them incapable of any benefit they had extorted by such concussion; and without such caution mankind could not be secured, nor the honor and interests of husbands kept up and preserved against the invasions and encroachments of their younger wives. And the complainers, as children of the first marriage and creditors, are not to be defrauded by subsequent children, who are less favourable in law than they; especially where the matrimonial provisions are more than implemented to these younger children; and George Ramsay's their grandfather's design, is to get himself and his friends to be the only managers of their affairs, because he has the greatest part of their means in his hands as debtor, that so he may dilapidate and embezzle what he pleases, and exclude the complainers, who will be the only persons who behoved to look to the welfare, standing, and preservation of these children, and for recovery and seeking in of their means; and for carrying on this design, she stole his keys, and broke up her husband's cabinets, and searched his whole papers, and forced him to alter his testament, and insert only her own friends as tutors to her children, who on the event, will find their interests more tenderly espoused by the complainers than by her pretended

friends, who are truly their indirect parties, having their means and estate in their hands: And if riots of this nature were in the least connived at, no man, either as to his goods or writs, would be secure against the insolent rapines of ane wife, having easier opportunities then any other; and as if all thir practices were not sufficient, the said Margaret Ramsay has these many years pilfered, squandered, and given away the said John Lauder his means and estate, for maintaining her father, and the said Doctor Trotter, her brother-in-law, and their families, in bed, board, and in merchant counts and clothing, so that he spends upwards of 8000 merks by a year on his family, though it is noutourly known, that the same is keeped so privately, that she does not bestow the half of it; and as a farther evidence of the contrivance and knavery amongst them to cheat and abuse the said John Lauder, Doctor Trotter (who was employed to procure the foresaid pretended patent,) did make him beleive that he could not get it cheaper than £100 sterling, whereas he had agreed with Mr. Thomson in the Cannogate for 1000 merks, and falsely and theftuously keeped the other 800 merks of it to himself, and yet affirmed he had given him the whole 1800 merks, with oaths, till he was confronted with the said William (Thomson, I suppose;<sup>1</sup>) and they have so far imposed on the said John, that they have caused him deliver back to the said Doctor a bond for 600 merks, though the annual rents thereof was sufficient salary for his pretended attendance as a physician, which (transaction about the patent;<sup>2</sup>) had a complication of breach of trust and many other crimes therein; and when Mr. Thomson refused to deliver up the patent till the 1000 merks were paid, (which was to be advanced out of the first and readiest of the rents owing by Edington to the said John Lauder,) they in a most base and discreditable manner to the reproaching that honour and integrity with which he has lived all his time, did unpignorate his silver-plate, whereon his name and arms were engraven, with the said Mr. Thomson, without the said John Lauder's knowledge or privity; and so little care had this unjust stepmother and bad wife of her husband's and his children's fame, that she did oft pawn the said silver work to Widow Cranston and others, to remain as ane pledge for money she borrowed to give the said George Ramsay her father, and Doctor Trotter her brother-in-law, not being ashamed, for her base ends, to bring her husband's fame and credit in question, whose ingenuity would

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<sup>1 2</sup> Notes by Sir T. D. Lauder.

have abhorred the thoughts of so sordid and snaking methods, though she would rather wadset his honour than want money for herself and her friends to carry on their unworthy designs; and the Complainers solemnly protest that nothing could have prevailed with them to have discovered the usage they have met with had it not been notourly known already, and were it not to assert and vindicate their Father's honour; and therefore the above-named persons ought and should be severely punished in their persons and goods, to the terror and example of others not to commit the like in time coming.

*De Souvenir les bracelets faites de cheveux de A. R. de W., &c.*—(This explained in the margin thus:)—That's to say, to remember the bracelets made of the hair of Andrew Ramsay of Winton.

And to all the former acts of injustice and oppression, the said Margaret Ramsay added a step farther imposing on her said Husband; that when he was prevailed on to purchase the lands of Idington from her Father, and to take the rights to himself and her in liferent, and to George Lauder their eldest son, in fee, the same is most unjustly provided to his heir whatsoever, so that failing of him and the other sons of that marriage the said lands might fall and descend to their sisters; and which case has now existed by the death of all the sons of that marriage; and whereof no example can be given that ever a parent provided lands to fall to his daughters where he had sons of any other marriage. Many parents have preferred their daughters in their estates, and excluded their brother from the succession, but never any parent preferred his daughters to his own sons: but all this was the effect of her influence and imposing, and noways understood by her husband, otherways he would never have consented to so unjust and unreasonable a conveyance, especially his daughter being competently provided and married without it: Likeas when this contrivance was made, and the disposition of the lands of Idington so taken, the said John Lauder was truly on death-bed, and never went to kirk and market thereafter, and so any conception the said tailzie was drawn in nor his acceptance thereof, could never prejudge the said Sir John Lauder his heir, to whose enorme hurt, leesion, and prejudice the same was, and therefore ought and should be reduced at his instance, as well as being impetrate by imposition, in manner foresaid, as also *ex capite lecti*.



**HISTORICAL NOTICES**  
**OF SCOTISH AFFAIRS.**



# HISTORICAL NOTICES

## OF

# SCOTISH AFFAIRS.

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### JUNE 1661.

AFTER two years surcease of justice, the Parliament called by King MS. A. Charles the Second (whom God preserve) did sit down the 1st of Januar<sup>fol. 50.</sup> 1661, the E. of Middleton being his Maj. Commissioner therein; where, according to old custom, they were *Domini ad Articulos, et Domini ad Interdicta et Judicia*, the first meddling with civil and criminal matters, the other only with matters civil. But the long want of justice, through the confusion of the times, occasioned a great number of pleas merely civil before the Lords of the Bills: who, being a Parliament, did not try themselves to law, but, upon complaints most unformal, they ordinarily reduced decrees given by the Lords of the Session in 1649, and by the English Judges; which occasioned much clamor against them, especially against my Lord Cochrane, who was President thereof, for his forwardness that way.<sup>1</sup>

Before this Court there was commenced a number of criminal actions containing a civil conclusion, or rather civil actions on a criminal

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<sup>1</sup> [*Marg. Note.*] Yea, they proceeded so irregularly in Pittarow and Craig's case, that they did not so much as examine the witnesses upon oath, but took their naked declarations. Zeno-crates at Athens was dispensed with. See this at large *alibi*. *Vide infra*, folio 292, Gairdner and Tennent. See August 1681, in the manuscript E. pag. 212, Pittarow.

medium, which they ordinarily referred to parties oaths to infer the conclusion; contrare to the custome in criminalls, when parties are not tyed to give their oath to infer any punishment. Among other quæstions, this fell in to be debated, If the probation of a criminall medium with a civill conclusion in a civill court might be repeated in a criminall court to infer punishment? Which they fand not relevant; but that the party might object against the witnesses in the criminall court, and to have them examined in his presence, which is not permitted in a civill court. Before the Lords of the Bills there was a disposition reduced by the Laird of Craig against Pittarro, *super capite fraudis et circumventionis*, and they had made him drunk when he gave it; the disposition beiring the receipt of 10,000 lb. as the price, wheiras he never received a denier: but the decision, and the manner of it, ware more in a parliamentary nor a juridicall way.

Before the Lords also, in the case of Montrose and Argyle, it came to be debat, Whither, if a forfaultor be reduced *ab initio*, and declared null, and the very authority it selfe by which he was forfaulted evacuated, if in that case the donator to the forfaulted persone ought to be countable to the persone restored, not only fra the date of his restitution, but fra the very day and dait of the forfaultor. Alledged for the donator, He was *bonæ fidei possessor, qui fructus perceptos facit suos*; my Lord Argyle having got the gift of Montrose's forfaultor fra a Parliament reput and holden for the tyme to be a lawfull Parliament, and by vertue theirow 20 years in possession; as in a decreit of reduction of an infestment, the defender is onlie liable fra the act of litiſcontestation, if sentence follow theirown, tho the decreit bear the infestment craved to be reduced, to have been from the beginning, to be now, and in all time coming, null and of nane availl, &c. Alledged for Montrose, Their was a difference betuixt a restitution *ex gratia* and *ex justitia*, and wheir the authority by which the forfaultor was pronounced is *funditus* tane away. In that *ex gratia*, it's true, the donator *fructus facit suos*, but not in that *ex justitia*, which is Montrose's case. Farder alledged, It's of dangerous consequence to bring men upon the stage for giving active obedience to Acts of Parliament, reput and holden to be lawfull for the tyme, and a long time after, tho rescinded.

Their ware many pleas of this nature before the Lords of Articles and Bills, against particular perſones for fynes and forfaultors, and wrongs done, fra the 1638 to 1651, and 1660, and for particular murders, and slaughters, and burnings, done 20 years before, wheirin parties ware very earneſt, for fear the A& of Indemnity ſhould paſs before the cloſing of their proceſſes : and the Commiſſioner was forced to put a demurre upon theſſe a&ions, til the King's mind ſhould be knowen theiranent.

20 Febr. 1665. *Toune of Edinburgh contra S<sup>r</sup> W. Thomſon.*—The A. fol. 53. Counſell of Edinburgh, without the concurſe of the crafts and their extraordinary deacons, having depoſed Sir W<sup>m</sup> Thomſone their clerk for this fault, that the Excife of their toune being fermed to 3 or 4 brewars by way of tack and contra&, wheirin the Counſell ſubſcryves their part of the tack, and remits to S<sup>r</sup> W<sup>m</sup> to ſie the fermorars ſubſcryve for payment of the duety ; and he neglecting to get their hands theirtō by the ſpace of yeir and day, and at the expiring of the tack the fermorars craving eaſe of the duety, and being threatned with a charge of horning, the Toune finds the tack not ſubſcryved ; and they having ordered Sir W<sup>m</sup> to ſie it done, and committed it to him by ane a& of their Counſell, they repreſenting to him his fault, he ſubmits his cenſure to the Counſell, who immediatly depoſes him without ather citation, libell, or any other ſolemnitie. He theiron raiſes redu&ion upon 4 reaſones, which are ſet doune at large in the Informations. The Lords at the advyſing of the cauſe fell 1<sup>ſt</sup> on the relevancy of the cauſe of his depoſition. After ſome debate anent the method to be obſerved, they fand the cauſe of his depoſition relevant unleſs he could prove the tacks ware yet ſubſcryved. The reaſons moving the Lords ware 1<sup>mo</sup>, That ſo great a neglect was a preſumption of dole on Sir W<sup>m</sup>'s fyde, tho he offered to make up the damage ſuſtained by the Toune throw the fermorars their not ſubſcryving ; and 2<sup>do</sup>, They thought, that tho the way of procedure was ſomewhat illegall againſt a clerk provided *ad vitam* to his place, yet that *multa fieri non debent quæ facta valent*, eſpeciallie betwixt a Mr. and a ſervant. The Diſpute I have at large. *Actor*, Wedderburn, Sinclar, & Lockhart.—*Alter*, Wallace, Cunyghame, and M'Keinzie.

A. fol. 56. b. 10 Nov<sup>r</sup> 1666. *Archbischof of S<sup>t</sup> Androis and his tacksmen*.—In this case found, that the A& of P. declaring all valuations and decreits of plat null, deduced since the 1637, did put the intromettors with the teynds in *mala fide* to pay to anie other albeit they payed by vertue of a sentence. *Actor*, Sinclar.—*Alter*, Beton.

A. fol. 57. 20 Decembris 1666. *Dundee contra Arbroth*.—The Baillies of Aberbrothock having borrowed some canons from their neihbours in Dundie, for defence of their toune against the English in anno 1651, for which they gave bond, ather to deliver the same unhurt, or else to pay 500 m̄. [merks] as their price; and the haill maritime townes of Angus being subdued, thir canons ware tane away *vi majore*; wheiron the merchands of Dundie having charged the Arbroth men ather to deliver, or to pay the 500 m̄. They suspend on this reason, that by the bond it's clear to be *contractus commodati*, by the nature of which contract, *commodatarius non tenetur prestare casus fortuitos, nisi culpa precedat casum*; and the canons being tane away without any fault of theirs, they cannot be lyable to the soume charged for. Answer: heir, *pacto susceperant in se casum fortuitum*, and so most be liable for the same, tho by the nature of *commodatum* they would not be liable; for heir, in case of failzie of re-deliverie, they oblish them to pay 500 m̄. as the price. The Lords fand the reason of suspension relevant to affoilzie them, unles the chargers would condescend on some negle& on their part to deliver the canon, and fand them not liable to pay the price contained in the bond, which was rathir adje&ed *nomine pænæ*.—*Actor*, Balfour & M<sup>c</sup>Keinzie.—*Alter*, Lockhart & Dinmuire.

1<sup>mo</sup> Nov<sup>r</sup> 1668.—Theirafter this cause came to be debat in *p[raesentia]* *D[ominorum]*, upon the clause contained in the bond, that they should deliver the guns without any hurt or scaith, which comprehends fortuitous cases *præter naturam commodati*; 2<sup>do</sup>. Alledged, this was not *commodatum simplex et regulare*, but *æstimatum*, whier per L. 3<sup>am</sup>, *D. Commodati, omne damnum est prestandum*. The Lords fand that clause in the bond, without hurt or scaith, did not comprehend fortuitous cases; that it was not *commodatum æstimatum* properlie, but a liquidation of the value in caise of scaith; for in *commodato æstimato pretium est in traditione*.

Dec<sup>r</sup> 1667. In the forsaide cause betwixt some honest men in Dundie A. fol. 59. and Arbroth the quæstion ran, whither the bond granted by Arbroth was *commodatum* or *mutuum*. The Lo. fand it was conceived in the termes of a *commodatum*; and the said *vis major* being *casus fortuitus*, Arbroth was not bound *præstare istum casum nisi culpa præcesserit casum*. They also found they ware bound *ex natura commodati in exactissimam diligentiam* for preservation of the guns. And in suit of this quæstion their did arise another, viz<sup>t</sup> if the diligence required behoved to be antecedent to the fortuitous case or subsequent,—the obligation to do diligence for recoverie theirow still remaining after that accident. Thus Arbroth ware forced to condescend on some acts of diligence; and the Lords, before answer, ordained Dundie to condescend on particular acts of neglect, and then to confider at the advising of the cause, if the diligence done was relevant to affoilzie fra restitution.

Then on Nov<sup>r</sup> 1668, when thir diligences came to be advysed, the cause was againe debat on the clause of the bond and the nature of *commodatum æstimatum*; after which the Lords fand as is before set doune. *Vide sup.* 20 Dec<sup>r</sup> 1666, thir same parties.

4<sup>th</sup> Februarij 1668. On Mr. W<sup>m</sup>. Somervell being condemned in a criminal court for usury, and having raised a Reduction of the verdict of the assise, before the Lords of Session, on error and iniquity committed by them, it came to be debated, If the verdict of ane assise might be reduced on that ground before the Lords. Contended, the Justice Depute being a judge distinct and independent fra the Civill judge, and the verdict of ane assise being a soverain sentence of a Criminal court, it could not fall under the compas of the Lords of the Session or their revieu; and it's a novelty, and of a dangerous consequence, to reduce the verdict of ane criminal assise. On the other hand alledged, that they craved only the verdict to be reduced as to the civill effects of it, and not as to the criminal. This was ane action extraordinarie, and never heard of before; the same came not to a sentence, but was agried.—*Actor*, Harper & Wallace.—*Alter*, Lockhart.

A. fol. 60. Junij 1668. About this tyme was given in a bill to the Lords of S. Counsell, complaining on my Lord Stormond for fraudulent abstracking of Gibsone the Laird of Durie's niece, to whom the custodie of hir persone in law belonged, and for being art and part theirow, by acceffion ather antecedent, concomitant, or subsequnt, viz' ratihabition, approbation, knowledge, &c. This bill was given in by Durie, and after a long dispute, the wholle resulting in my Lo. Stormonth's oath, he denied all acceffion theirow; tho it was stronglie sounponned he was not frie.

A. fol. 75.  
No. 25. 18 June 1670. *Proctor fiscall of the Isles contra Wallaces, executors of the late Bischop their.*—Their was a competition betwixt the Commisfar of Glasgou and the Commisfar of the Isles, who had the right of confirmation of the Bischop's testament. Alledged for Glasgou, that *Regula regulans* of confirmations is *domicilium defuncti et ubi habebat focum et larem*. But so it is, he had his residence, his wife, his bairnes, and his familie in Glasgou; and tho he was Bischop of the Isles, and died their, yet he had not so much as a pot or a pan their, and when he went their, it was onlie itinerarlie, but nowayes *animo remanendi*. Alledged for the Commisfar of the Isles, that he being Bischop their, *presumptione seu fictione juris*, he most be presumed to have had his residence their; at the least, by the law of God and the Ecclesiasticall canons, he ought to have resided their; *item*, he divided the yeir and stayed all the winter in Glasgou, but the wholle summer he was constantly in the Isles; and wheir its said he had also his armor and plenishing, both spirituall and temporall, at Glasgou, Sir Geo. Lockhart offered him to prove he had both books and brande in the Isles; *item*, he died their. As to the non-residence Glasgou answered, that the rest of the clergie had dispensed with that in respect of his valetudinarines. The Lords finds the Isles should be preferred, if, at the tyme of his death, he was their *animo remanendi*, which they offered to prove. *Actor*, Wallace. *Alter*, Lockhart.

A. fol. 78.  
No. 54. 2<sup>do</sup> Julij 1670. *Dumbar contra Mr. Murdoch M'keinzie, Bischop of Murray.*—This was a declarator at this Dumbar's instance agt the Bis-



chop and his sone, comisar of Murray, to heir and fie it found and declared, that he hes the sole and undoubted right of the comisar clerkship of Murray in all tyme coming, and for bygaines craves repetition of the wholle benefits and obventions of the said office ever since his unjust and illegall deprivation by the Bischop. It being demanded by the Bischop by what right or title he laid clame to that office, it was answered, he had right from Mr. John Hay, who was established comisar of Murray, by the King himselfe, in his gift under the Great Seall in 1646, and ratified thereafter in Parl. who, by his said gift, had power to elect and choise such clerks as he pleased himselfe, which clerks so chosen by him, ware to bruik, *ad vitam*; and, conforme to this power, he nominat this pershuar clerk, who ever continued in the peaceable possession theirow till the A& of Restitution of Bischops in 1662, at which tyme the defender most unorderlie thrust him out and placed in his oun sone, who has ay possessed sincefyne. Then the Bischop alledged that his right was null, and so could not be declared, because he was placed *a non habente potestatem* to place him, in so far as, *esto, argumenti causa*, the gift granted to Comisar Hay had borne a expresse power to place a clerk, the same was onlie *filius curiæ*, and could operat nothing in prejudice of the King, (who at that tyme, notwithstanding of the gift, might have disposed on the said clerkship to whom he pleased,) nor of the Bischops, who, by the A& of Restitution, ware stated in his place: and they called to mind a praetique in 1647 betwixt the Bischop of Galloway, and—where the Bischop having empowered his comissar to choyse and admitt proctors, it was found by this power he could not enter a proctor fiscall. But, 2<sup>do</sup>, The dispositive clause in all writs, (whither they be charters, gifts, or other writs,) being that which regulates the wholle tenor and strain of the writ, where anie thing is omitted out of the same its no wayes understood to be transmitted at all,<sup>1</sup>—but so it is heir; theirs no mention in the said clause of the gift of the comisar-clerkship or of any power of establishing a clerk. To thir 2 it was answered, that it was sufficient the power was in any part of the gift. They ware to have the Lords answer on this. Then alledged,

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<sup>1</sup> *Vide Cragium, pag. 150, circa mediam.*

3<sup>th</sup>, absolvitor fra this perfhuit, becaufe its offered to be proven that the perfhuar hes homologat the right of the faid office inherent in the defender's perfone, and hes past from anie pretended right of his oune, in fo far as he, by a fubfcryved minut betuixt him and the Bifchop, hes acknowledged the Bifchop to have a good right, and hes renonced his oune clame and condefchends to deliver up the registers and other writs concerning the office,<sup>1</sup> providing the Bifchop pay him, by the fpace of 3 years, 300 m. yearlie, which the Bifchop is content to do. To which it was answered, that for the Bifchop to found on that minut is *propriam turpitudinem detegere*, becaufe its offered to be proven that when the A& of Reftitution of Bifchops was making, the defender fent frequentlie for the perfhuer and fhowed him whow the King and Parl. was about the reftoring of Bifchops *in integrum* to all their former priviledges and confeffions, and the caffing and annulling of all provifions to offices procured in the tyme of the troubles; *item*, prefentlie on the making of the A& he caufed double the fame, (onlie he keiped out the falvo that was made in favors of comifars, their clerks and others, who ware in poffeffion of their offices,) and, fo mutilat, did fhew it to the perfhuar, and told him that was the A& made; which falfe and difingenuous representation was the impulfive caufe and inducement that moved the perfhuar to enter in that contra& with the Bifchop, and he never difcovered his error till the A& was published beiring *in gremio* a referve *ut fupra*. It was replied, this was *ignorantia juris*, which excufes none, and can never liberat him of the minute; he, being then major *sciens et prudens*, and a man that know the lawes of the kingdome, at the leift fhould have known the fame. The Lords fand the reafon relevant to be proven ather by the Bifchop's oath or the witneffes prefent at their communing.

A. fol. 79, 2<sup>do</sup> Julij, 1670. *Sir Alex<sup>r</sup> Cunyghame of Camfkeith contra the Toune of Hadintoun*.—This was a charge for deliverie to him of a cup, or of 15 lb. f. as the price theirof, which the faid toune was decerned by the comifars to make payment of to him, as he who had win the

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<sup>1</sup> *Vide* D. 17 Febr. 1624, Thomsone.

same at their horse race. The reason of suspension was, that this being about a horse race, it was no way a consistorial matter, and so the comissars were not judges competent to the same; but *esto* they had been judges, they committed manifest iniquitie, in so far as they repelled a unanswerable defence in law, viz<sup>t</sup> that Camfkeich could never be heard to feik the cup, because they offered them to prove, that being wieghted at the louping on and at the leaping of, he was lighter when he leipt of then when he began, and so can never plead the cup; and this, tho the same was proven by the judges sworn and appointed for wying them. Answered,—This is *jus 3<sup>o</sup>*, to the toune, and nowayes competent to them, but only to the 2<sup>d</sup> rider, who compeirs not. *Item*, denies their ware anie such perfonas sworne to wy them, as also offirs to prove the custome in that place is that they do not wy them at their leaping of, which speciall custome most derogat to the generall custome of wying them elfewheir; *quia specialia derogant generalibus*. This custome was found relevant. *Actor*. Charger, Cunyghame; *Alter*, Sinclair.

16 Julij 1670. *Vicount of Stormond contra E. of Northesk*.—The E. <sup>A. fol. 82, No. 78.</sup> of Northesk, then E. of Ethie, having imployed the Vicount of Stormond by his missive letter, to procure to him the change of his title of honor, declaring that what he should expend in doing theirow, he should thankfully repay the same. The Vicount having procured the same by the mediation of Mr. Andro Hay, and having given above 100 lb. sterling theirow, perswades the E. upon his missive, for reimbursing him that and his other expences. Their defence was upon compensation. *Actor*, Mr. W<sup>m</sup> Murray.—*Alter*,

29 Julij 1670. I hear their is ane improbation raised at my Lord <sup>A. fol. 85, No. 101.</sup> Rutherford's instance, against on John Rutherford, a servand of his umquhile brothers, and on who intrometted with his estate divers years, of some bonds granted to the said Jo. by the deceit Lo. Rutherford, amonting neir to 2000 lb. sterling, with a generall discharge of my Lo.'s of all he could charge him with, and ane assignation to fundrie debts due to my Lord. The reasons against the assignation are, 1<sup>o</sup>, offers to prove

my Lo. was lying in the Abbey fiek that day wheiron the said affignation is forged to have bein subscrived, and yet it bears subfcrived at London ; fo this reafon is on *alibi*, and for adminicling the fame, they adduce Ja. Borthuick's count-book, beiring that a potion of phyfick was adminiftrat to my Lord that day, he lying in the Abbey. 2<sup>da</sup>, theirs on Broun, (defigned in the affignation, indweller in Lauder,) who is writer theirof, and alfo fubfcribes as a witneffe, their was never fuch a man, nather dead nor living ; or if they can adduce any fuch man, then they offer to prove that's not his hand writ. *Vide infra*, thir perfones hanged, folio 309.

A. fol. 105,  
No. 224.

27 July 1671. In the forfaid Improbation mentioned at number 101, betwixt my Lo. Rutherford and Captain Rutherford, the Advocats in ther reafoning entring upon the matter, the Lords ordered Ro<sup>t</sup> Hamilton, maiffer, to goe and bring the defender out of the tolbooth, wheir he had lyen of a long tyme before, to their prefence, in caife their fould any thing occurre wheiron he might be interrogat by them ; whille he is coming over, he pretends their ware fome papers in Collifton's chamber in Befle wind, which would be of great ufe to him if he took them with him ; and, theirfor, begged leive to fetch them, and paroled he fould prefentlie returne. The maiffer trufing him fimplie, Rutherford makes his efcape ; the rumor wheirof running up and doune the toun, Towie Barclay, who was lately but releafed from his confinement at Glasgou, comes in to the Lords in the Inner houfe and proffered to find him out and fetch him againe within ane hower : which accordingly he did, with a great deall of zeall, expreffing that he could not abyde cheatrie by anie thing in the world ; fuch perfones know ane another's lurking-places fo weill. [No. 101, fol. 85, No. 664, fol. 309.]

A. fol. 85,  
No. 102.

3 November 1670. *Toune of Iruing contra Robertland*.—Camfkeich being addebted in a certaine fomme of money to Campbell, writter in Edinburgh, he employed a meffenger, with 15 or 16 Highlandmen he got at Dumbartan, to go to Sir Alexander's houfe at Robertland, with letters of poinding, to poind fuch goods and geir as they found on the ground of the lands, or in his dwelling-houfe. Sir Alexander was from home ;—they poind fome horfes, &c., and brings them nixt morning to the mercat

croffe of Iruing (as ufe is) to be appryfed their. Sir Alexander gets notice of it; he runs to the Earle of Eglington, as bailzie of the jurifdiction, complains whow he was affronted, that fome had come and plundered his houfe under the pretext of poinding; procures from him fome 20 men to go and recover them. With thir men he enters Iruing, and with violence offers to hinder their poinding. The Proveft being prefent, entreated them to behave civilly, and remember they ware in a brugh-royall. Robertland's man, after much infolent boafing, drew his fword, and ran at the Proveft, and would undoubtedly have flain him, had he not bein immediatly knockt doune by fome of the toune-officers, and killed. Now, Iruing is perfhuing before the Secret Counfell, a ryot and convocation of our Sovereine Lord's leidges, and a impeding the execution of his Majesties laws in contrare the A&ts of Parliament; and he againft them, for the slaughter.—The Toune was affoilzied.

The Advocats at laft having boated on the 10 of January 1671, they <sup>A. fol. 85 b. No. 102.</sup> having made a feceffion for fome weeks becaufe of the Regulations, we returne to our former Obferves.

2 Februarij 1671. *Earle of Argile againft Geo. Cambell.*—The Earle <sup>A. fol. 88 b. No. 122.</sup> perfhues the Shiref, as having bein chamberlane to his Father the fpace of divers years, to compt for his intromiffion with the rent of his lands. Againft which it was alledged, that he could not compt for his intromiffion theffe years, in refpect he had a generall difcharge of the then Marquis, pofterior to all the intromiffions libelled, *vizt in anno* 1649, wheirin this very perfhuar is a witnes. To which it was replied, that the Shiref was in *mala fide* to take a difcharge of the then Marquis, this perfhuar's father; becaufe, before the fame, he was involved in fundry hainous, enorme, and atrocious a&ts of treason, for which he was their-after forfault *in anno* 1661, and fo was incapable by the law to grant any difcharge.<sup>1</sup> Duplied, the faids a&ts of treason committed by him, for

<sup>1</sup> *L. 19, D. de R. Juris, Unusquisque debet scire conditionem ejus, &c.* See 6 Decembris 1609, Cunyghame and Home. See Balfour's Collection of Practiques, Tit. 19 of payment, *in principio*: It's folio 32.

which thereafter he was forfault, being moſt latent and ſecret, nather could I (nor indeid was I obleidged) to know them, unles they had bein nottor to the wholle country as they ware not: and thus was it decyded in Regent Morton's caſe,<sup>1</sup> who, 16 years after the faſt, being accuſed for the treaſonable concealing of King Hendrie's murder, no diſpoſitions nor other deids whatſomever made by him, all that tyme before his accuſation, ware quarrelled; and of all neceſſity and reaſon it moſt be ſo, wheir the crimes are latent and not obvious to every man's capacitie, as was in Morton's caſe, and ſo alſo heir; elſe what a horrible uncertainty would men be put to, to know the moſt privie and cloſe intrigues of thoſe with whom they contract or have otherwayes to do, leiſt they be lying in the guilt of treaſon. 2<sup>do</sup>, He can never pretend that his Father could not then grant a valid diſcharge as being *aſtrictus crimine læſæ majeſtatis*; becauſe by the decreit of forfaultor given againſt him, it appears that the main acts and crimes for which he was forfault ware all committed by him after his granting the ſaid diſcharge, *viz*<sup>t</sup> in 1654, in which he complied mightily with the Uſurper; for tho in his criminall libell their was many other things accumulat againſt him, which ware perpetrat before the date of the ſaid diſcharge, yet his compliance in 1654 was the thing the Advocat then inſiſted only on; and he declaired he reſtricted his ſummonds theirto. 3<sup>do</sup>, Craig, page 86 *in initio*, tells, that payment may be lawfully made to ane guilty of treaſon at any tyme before ſentence, which he may alſo diſcharge; but *ita eſt*, this diſcharge proceided upon payment made to this purſhuar's Father of the rents of the lands intrometted with by him; Ergo: (*vide infra*, numero 406.) The E[arle] alſo alledged, that, notwithstanding of this diſcharge, the defender muſt count to him for ſome particulars of his intromiſſion that he ſhould pitch upon, becauſe he offered him to prove by the defender's oath, that he had not counted for the ſame. To this it was answered, that the diſcharge behoved to liberat him from giving his oath anent any intromiſſion with the granter's rents before the date of the ſame; and that

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<sup>1</sup> *Reo majestatis non recte solvit debitor, L. 6 C. ad L. T. Majestatis, 4<sup>to</sup> l. 8 & sequ.: D. de solutionibus.* See Hope Tit. of Treason, folio mihi, 246. Sic Craig, page 86, num. 446 & 479. Conranus, libro 5 Commentariorum, capite ultimo.

it ware a very dangerous thing if men ware put to their oath wheir they sufficiently instruat by writ, especially confidering that it's now 20 years and more since he counted and gave up all his instructions to this pershuar's Father, upon which exact account followed this discharge, and that *tanti temporis intervallum* produces in law probable oblivion; yea, the halfe of it suffices; *Mascardus de Probationibus, Conclus.* 1128. Replied: the defender had no prejudice to give his oath, tho it was *in facto antiquo*, because if he should depone *non memini* whither I counted for such or such particulars, but for ought I know I did; this will affoilzie the defender, in regard his deposition proves not the pershuar's replie. The Lords ordained the defender to depone. This was my Lord President's doing, he being ay Lord Argyle's great confident. It was admired by all, that he blushed not to make a reply upon his Father's forfaitor, and whow he had committed many treasonable crimes before the discharge; and to fie him, rather than tyne his cause, suffer his Father to be reproached and demeaned as a traitor, of new againe, by his oun advocats.

3 Februarij 1671. *Lord Dumferling contra the vassells of that Lordship.*—He having given in a bill to the Exchequer, desiring they might not enter any of the vassalls of that Lordship, but that they might all pas by him, as having a three 19 years' tack of the wholle casualties, obventions, and few fermes theirol, at leift that they would enter none til they produced a certificat under his hand that he was satisfied anent their composition. It was alledged for the vassalls, that the Earle's right was null, because of the law, long tacks, such as this was, are æquivalent to ane alienation; and all alienations of the King's annexed propertie and proper patrimonie of the Croun, are discharged by many A&ts of Parl.; but, *ita est*, the Lordship and Abbacy of Dumferling is of the property annexed to the Croun, tho not by the generall a&t in 1587, yet by a posterior a&t in 1593, its specially annexed, and it most be also supposed to be comprehended in the a&t of Annexation 1633. 2<sup>do</sup>, the tack being granted in 1641, and his Maj. considering that many things had escaped both his oun and his royall Father's hands during the tyme of these confusions, he hes, in 1661, revoked all

A. f. 89,  
N. 124.  
See a 4to.  
Manuscript,  
pagina 20.

deids done by him then, and tho by ane particular act in 1661, this tack be excepted fra his Maj. revocation, yet it moft fall under the fame; becaufe, 1<sup>o</sup>, The act *salvo*, according to its explication in 1633, referves all parties intrefles as they ware before the making of theffe ratifications. 2<sup>do</sup>, The explanation of the tack wheiron my Lord Dumferling layes greateft ftrefle, is not ratified at all, and fo it is undoubtedly revoked. It was answered to the 1, That if the Lordfhip of Dumferling ware indeid of the annexed property, the fewars and vaffells would be fo ftrongly founded on law, reason, and acts of parliament, that it would not be eafie to returne them ane folid answer; but that their cafe was nothing fuch, for that Lordfhip belonged not to the King, *jure publico feu coronæ*, but *jure privato proprio et jure fucceffionis*, as air ferved and retoured to his mother, Quean Anne, in 1629, to whom it was difponed by King James at Upflo, (upon Abbot Pitcairne's refignation in his hands,) *per morgantificam*, and in a morning gift, which irredeemable difpofition is confirmed in the fame Parliament, wheirin throw miftake, its forfooth annexed to the Croun, *viz.* in 1593, and fhe was theirupon infeft by chartor and feafine which are yet extant to fhew; now it falling to the King as air, and being privat patrimonie, what power a baron or gentleman hes, the King moft have the fame in difpofing of it, fetting it in tackes or otherwayes at his pleafure; *Ita, Craigius, pag. 110*, and its exprefly fo ratified by the Parl. 1612, act 10. Replied,—That the infeftment given to Quean Anne was undoubtedly a null infeftment, and if it had bein quarrelled, it could never have bein fufained; and it having bein produced and proponed on in the proces perfhued at the inftance of my Lord Secretary, as Lord of the Regality of Muflebrugh, (which of old was a part of the Abbacy of Dumferling,) againft the fewars of Coulland, it was not found a valid right wheirupon to defend; and whatever was in that, the faid Lordfhip recurring to King Charles as air to his mother, it became againe of its oun nature, and returned to be of the patrimony of the Croun, and fo is to be underftood in the annexation of the fuperiorities of Kirklands made in 1633.—This went to interlocutor, and they found the Lordfhip of Dumfermling was truely of the annexed property; but they waved it, and



would not give furth their answer to his bill; wheirupon I hear he hes made new addressees to his Majesty.

13 Februarij 1671. *Lord Halton contra Scrimgeor.*—This was a de-<sup>A. fol. 89, 90,  
No. 130.</sup>clarator of his gift of *ultimus hæres* to the deceift Earle of Dundie. Against which it was alledged for Kirkton, that their could be no declarator, becaufe by the very chartor produced by them in proces, there was a claufe of substitution conceaved in favours of the defender's good-fire, wheirby failzeing of aires mail of Dudhop, the lands ware tailzied to Kirkton and his aires. *Item*, offered to prove by writs in the chartor cheft, (which had bein given up to Halton upon a naked bill,) that he was within the 9<sup>t</sup> degrie of consanguinity to the last Earle, and that all by the male line; for proving wheirof, he craved inspection of the said chartor cheft. This was denied him, and he was appointed to pershue ane exhibition theirow againft Halton, as accords, for making his specifick fibnes appear. And for the tailzie, it was brocken since, upon which the gift was declared, reserving *ut supra*. This was thought hard.

13 Februarij 1671. *Earle of Argyle contra the Lard of M'Naughton.*<sup>A. fol. 90,  
No. 131.</sup>—This is a declarator of property of the forest or mountaine of Benbowie. Against which alledged for M'Naughtan, that the same was properly his, lying within the bosome of his lands, environed theirby at 3 corners, and lying open only at one; it was also contained in some of his feafins, he had been in possession of it thesse 100 of years, by all deids and acts of possession and property, and by debarring the pershuar from the same. Answered, that any acts of possession he had, ware only as subforrester to him, and so can never be relevant to infer property, wheiras the Earle posselt by all acts of dominion that can be condescended on; and it ware a strange thing in the Hielands to stear any doubt who was heritor of that forest, since it was never controverted their but its the Earles, and he hes slain a 150 deer in it at a tyme, and hes interrupted any possession the defender had. *Item*, their is quinquenniall possession retoured, anterior to the forfaultor, which is eneugh to the King

and his donator, by act of parliament. They being both alike pregnant in their alledgeances, their is a mutuall probation appointed them, *hinc inde*, for leading witneses upon their possession. They will both get witneses enough to prove what they please. *Vide infra*, number 348.

A. fol. 136,  
No. 348.

25 Junij 1672. The Lords having considered the probation used in the action, marked *supra* at number 131, betuixt the E. of Argyle and the Laird of M'Naughton, they find the forest contended for to be a pairt of my Lord Argyle's property, and theirfor decernes M'Naughtan to remove their from. Every on forlaw this would be the fate of that action, considering the perthuars probable intres in the President.

A. fol. 91.  
No. 144.

22 Februarij 1671. *Earle of Erroll contra the E. of Finlator and others.*—The Barronie of Arroll being sold in this Earle's minority, to my Lo. Kinnoull for 589,000 mks.; in the contract, Kinnoull, and fundry others with him, ware oblisht with that vast price to satisfy the particular debts given them up, which burdeined the estate of Erroll, and to report valid discharges theirol. This pershuit is now for seing if the money was employed for the use to which it was destinat, and for reporting thesse discharges.

A. fol. 91,  
No. 147.

23 Februarij 1671. *The Tutors and Mother of Govane.*—This Govane's goodfire and father having bein merchands in Glasgow, and hir father dieing and leiving hir, his only child, behind him in hir non-age, heritrix of a considerable forton, what in land, what in money, the goodfire, (of whosse acquiring the wholle means was,) being on life, became administrator of the law to his grandchild, and in his testament did nominat severall perfonen in whom he much relied as hir tutors, being perfonen also sib to the pupill, who, *ex super abundanti*, took a dative and fand caution. The lasse being now out of hir infancy, viz<sup>t</sup> past 7 years of age, the tutors, by an action against the mother, (who yet continues a widow,) craves the perfone of the pupill may be exhibite to them, to the effect they may have the custody of hir conforme to the constant law and praetise of this kingdome, which presumes tutors will be more carefull of the education of pupills, and not so indulgent, by which many are sadly

corrupted, as the mother will be. The Lords, because they discovered an inclination in my Lord President towards the tutors, they theirfor, in a bang, combined in behalf of the mother, only because it was represented to them that the President was a freind to the tutors, and carried it over his belly, that the child should continue with the mother. *Vide* 14 Julij 1627, Noble; 4 Julij 1629, L. Langshaw *cont.* Muire, and the cases their.

It is uncontroverted but the Members of the Colledge of Justice *in civilibus* have *præscriptionem et privilegium fori*, none others, by A&s of Parl. being judges competent of their civil actions but the Lords of Session only; but whither it be so *in criminalibus*, as ryots or the like,<sup>1</sup> may be much doubted. Upon the one hand, it seimes that the Magistrats of Edenbrugh, (tho justices of peace within themselves,) nor no inferior judges to the Lords of Session, S[ecret] Counsell, or Justice, can medle with them, because, by A& 23 Parl. 1661, ratifieng the wholle Colledge of Justice priviledges, its declared, that all liberties and immunities belonging to the Lords of Session are extended to belong and appertain by [to] the Advocats and all other Members of the Colledge of Justice,<sup>2</sup> but *ita est* by expresse A& of the same Parl., *viz.* A& 38, containing instructions to the justices, the saids justices of peace have no power to medle with the Lords of Session, *ergo*, naither with the other members of Session;<sup>3</sup> yet by that same 38 A& it would seime, in the matter of riots and such like, the members of Session may be punished and proceeded against by the justices of peace, and consequently by the Magistrats of Edenbrugh, because they are empowered to proceed against all offenders whatsoever under the degrees of noblemen, prelates, counsellors, and Senators of the Colledge of Justice, unles we say the wholle members of Session, most be understood

A. fol. 94,  
No. 161.

<sup>1</sup> Paulus Voet, in his tract *de Statutis*, pag. 282, states this question, and thinks an exemption to Advocats from answering to Inferior courts of this kind should not extend to Criminal actions.

<sup>2</sup> *Vide* my Observes on the occurrents in the Session in January 1677, in Tom Baird and B. Charteris' case, pag. 5, 6, &c. [f. 272, n. 531.]

<sup>3</sup> *Vide infra*, folio 219, [No. 721, § 7.]

their under the Senators of the C. of J., as enjoying all the same privileges with them. Our privileges got a fore dash in 1670, by the 8 Act of that Parl. where the Lords of Session their privileges are ratified, and nothing of the rest. See my animadversions upon that Act.

A. fol. 94,  
No. 158.

5 Martij 1671. *Earle of Monteith & the L. of Douchry*.—This was a mutuall ryot perfhued *hinc inde* before the Counsell. Douchry possessing some of my Lord Airth's lands as tennent, and refusing to remove, my Lord gets decreit of removing against him, and thereupon he is ejected by the shire; notwithstanding whereof he intrudes himselfe in possession again; whereon Airth takes out a caption against him, and sends to take him. He takes out a protection and waves it about his head, and bad the best of them offer to stir him when he had that. They desired a fight of it; he refusing, they thought themselves not obliged to take notice of it tho it ware, feing it could defend him only from personall debts, but not from caption for not obeying a decreit of removing and ejection, and so offered to take him; he, his sones, and servants, drew their swords, first hurt severall of Airth's men, and mutilat one [man] of 2 of his fingers. The Lords having examined both their witnesses found Douchrie the [first] aggressor, and thereupon laid him in prison.

A. fol. 94,  
No. 159.

5 Martij 1671. *Two Merchands in Dundy, contra the Proveft and Bailzies their of*.—This was ane action for wrongous imprisonment against the Magistrats, who ware alledged, out of malice, to have called thir 2 persones to cause them depone upon oath whow much wine they had sold out to their customers; to the effect they might know what they had to exact of these retailers for making up their proportion of custome and excise, which, by Act of Parl. the brugh payes to the Kingis Majesty. This the merchands refused to do as a thing extraordinar, not practized in Edinburgh, nor any place in Scotland, and done only of purpose to make all ventoners go by them, and so break their trade. Upon their refusal they ware committed to prison, whereof they now complain to the Counfall.

9 Martij 1671.—*My Lord Advocat & Erskin of Dun, his informer, ag<sup>t</sup> A. fol. 94, Charles Robertfone & his 2 fones, indweller in the Braes of Mar.*—This No. 162. was a ryot pershued against the 2 boyes as the principall a&tors, and against the Father as hounder out, commander, at leift ratihabiter, for throwing doune, *vi armata*, openly in day light, with intention to oppresse the subje&ts, a sheild belonging to Dun, wheirin he made his butter, cheife, and other milknes, before the Criminall judges. Alledged, by Sir G. Mackeinzie, for the 2 bairnes, that they could not pas to the knowledge of ane affise, becaufe, being *infra pubertatem*, within the years of 14 when they committed the fact, they ware not *doli capaces*, and so not punishable of the law. Answered;—Tho they were not *puberes*, yet they ware *pubertati proximi*, viz<sup>t</sup> 12 or 13 years old at leift, and at which tyme the law presumes them to be *doli capaces*. Whowever, in regard of their non-age, the Advocat declared, their convi&tion of this crime should not infer danger ather of life or limb, but only *pœnam extraordinariam*. The Justices fand them of the age wheir they ware capable of dole and mischeiff, and theirfor found they should pas to the knowledge of ane inqueft. This was a great interloquitor: fie the like debat on the 24 of August 1612, Mauchan ag<sup>t</sup> James Middleton, for slaughter of his sone, in my Compend of the wholle criminall registers.

2<sup>da</sup>, Alledged for the Father, that he cannot pas to the knowledge of ane inqueift, becaufe, he being only pannelled as ane acceffor, for giving command and order to his fones to do the crime, till they who ware conveyned as the principall a&tors be tryed and discuft and found guilty, he cannot pas to ane affise, conforme to the law of the kingdome, and particularly the statutes of K. David the 2<sup>d</sup>, cap. 29, and, if the principall a&tors ware absent, a Judge could not proceed against the complices. Answered Advocat;—The same ware most unjust, and he supposed a man had given a warrand in writ for killing another; accordingly, the murder was committed, and *notorie constat de corpore delicti*. The commander is accused for giving the warrand,—he denies it not,—shall his punishment be superceeded and he goe frie, becaufe, forsooth, the principall a&tor, and his instrument, is fugitive, and cannot be got, *nullo modo*.—The Lords found the Father should also pas to the knowledge of ane inqueft, notwith-

standing he was only a complice, and the main actors ware not yet convict.<sup>1</sup>

Then it was controverted whow the Father's order could be proven, for *scripto* it could not be, feing none would be so mad as to give under their hands a order for committing a crime;<sup>2</sup> and against the proving it by witnesses, it was alledged it was of the nature of *mandatum*, but *mandata in civilibus* cannot be proven by witnesses; *ergo multo magis* most it be so *in criminalibus*. Yet the Lords fand their was no other way to prove commands of crymes but by witnes, and theirfor sustained it so probable. Then alledged, if it should be proven that the Father commanded them, the boyes behoved to pas frie, because they did it in obedience to their father's command, and *in jure velle non creditur qui obtemperat imperio patris*; and cited also ane act of adjurnall in the year 1662, whier on John Rae being pannelled for thift, this defence was proponed by Mr. Thomas Baird,—that he was *impubes*, and so not *doli capax*, and he did it in obedience to his father's command; Sir G. Mackeinzie's felfe, fitting then Justice Depute, admitted the defence and affoilzied the boy. My Lo. Newbayth chanced to say, it was *peffime judicatum*; Sir Geo. answered, it was most just, and that he had determined as legally while he sat Justice as he or any that would come after him. This occasioned a great heat between them, and gave rise to severall reparties. Yet I discovered my Lo. Advocat, S. G. Lockhart, and others, of the mind that that sentence 1662 was rash and inconfiderat; whowever, I have heard it had some weight, in 1662, to affoilzie George Campbell, Shiref of Argile, of fundry slaughters committed by him, that he did them at command of the Marquis of Argile, *cui bene resistere non poterat*.

Then 2 witnesses ware brought in for proving the fact. Objected against them;—They could not be received, because they ware *conscij criminis*, present at the committing of the cryme, of the number of thosse

<sup>1</sup> *Vide* 13 Januar, 1679, Todridge, pag. 48. *R. Ma. lib. 4, ca. 26.* *Vide* this sustained in the triall of Classicus' complices, as its related by Plinius 2<sup>du</sup>, lib. 3<sup>o</sup>, *Epist. 9<sup>na</sup>*.

<sup>2</sup> By oath of party it could not be proven, because it imported life or limb. *Item, nemo tenetur, jurare in propriam turpidinem.* *Vide infra*, num. 295 and 445, in Dunfermeling and Calandar's case, *prope finem*.

convocat, and as guilty, if not more, of the crime than the pannells; and who have got assurance of impunity from the pershuar, (with whom they collude,) that they shall never be troubled for their offence, providing they come in, and, by their depositions, fyll the pannells.<sup>1</sup> Answers Advocat;—*Regulariter conscij criminis non admittuntur.*<sup>2</sup> Yet that rule is only to be understood *in criminibus capitalibus infamiam irrogantibus, in talibus non admittuntur conscij criminis, quia gravius versatur præjudicium*, unless it be *in criminibus exceptis*, such as læse-majesty, &c., but in such petty inconsiderable crimes as this, wheir a pecuniary mulct comes only to be imposed, *socij criminis* may very weill be admitted to depone against them, tho in no case can they be used for them. Replies pannell;—That he oppones the inviolable practise repelling *correos delicti*; item, intreats the King's Advocat to remember whow stoutly he plead in the case of Captain Barclay, that *conscij criminis* could not be admitted to bear witnes, and ware for that reason repelled; item, the Law of the Majesty expressly repells *conscios criminis* fra testimony without any such distinction as my Lord Advocat makes, *Stat. 2<sup>da</sup> Ro<sup>ti</sup> Primi cap. 34.* and his distinction seimes rather to be in the contrare; for *in criminibus gravioribus et capitalibus maxime interest reipublicæ ea detegi ne maneata impunita*; and theirfor all manner of probation ought to be admitted, but *in levioribus* not so; item, better that no crime in the world ever should be proven than that it should be made out by false menfsworn raskals such as the *conscij criminis* for the most part are: *satius est impunitum relinquere nocentem, &c.* Hope likewayes in his collections, Tit. of Treason, tells of a statute of session in 1591, by which infamous persons, *socij criminis*, and others, are admitted to bear witnes in the case of læse-majesty, and that this statute was made upon a quære from the then justices. Duplies Advocat, That Barclayes case meits not because that was *in crimine capitali*, but such is not this; item, the Law of the Majesty most be understood with that distinction; and for the citation out

<sup>1</sup> Vide Hippolitum de Marsiliis sing. 209, Grammaticus decis. 25 & 28 & 56.

<sup>2</sup> See this case at large, both in Sir G. Mackenzie's pleadings, pagina 207, & in his Criminalls, pagina 344.

of Hope, the same is not authentick, it being only Hope the younger, nather does he ever remember of such an act of federunt; nixt, it ware impossible to prove ryots of this nature, if they admit not perſones preſent at the fact to be witneſſes; and this is ordinarily done in ſpulzies perſhued civilly, and deforcements perſhued criminally, eſpecially before the Secret Counſell, wheir they proceid *per viam inquisitionis*. Triplied, The laws being abſolute, we ought not to admit of any diſtinction, *ubi lex non diſtinguit nec nos, &c.* The Lords found the witneſſes not receaveable, in regard they ware *focij criminis*. The Advocat was hudgeſy diſpleaſed with this interloquitor, and ſaid, the King and Country loſt not ſo great a interlocutor theſſe 20 years: and truly S. George Lockhart, and others, thought it unjuſt in its generality, and thought the Judges ſhould have inferſt in their interlocutor the particularities of this caſe, that moved them to determine ſo. *Vide l. finalem c. de accusationibus clarum parag. ult. Qu. 21, de Socio criminis et de mandatore; item, Qu. 60, tam de ætate minuente delictum quam de mandato superioris:*

The aſſiſe being enclouſed, they ware aſſoillzied for want of probatione.<sup>1</sup> If Dun had perſhued it before the Counſell, he would have got the father's oath upon his order, or ratiſhabition of his ſone's ryot, which he could not get in the Criminall court, and that would have made ſhorter proces. Their be 5 great interlocutors in this one feckles cauſe, and which will prove leading caſes in all proceſſes heirafter. *Vide etiam Matthæum cap. ſecundo prolegomenon. Qui crimina poſſunt admittere, ubi de impuberibus; item, de Probationibus, cap. 2<sup>do</sup> de Teſtibus pag. 731, de ſociis criminis, et paſſim alibi.*

A. fol. 100,  
No. 179.

22 June 1671.—The inhabitants of the toune of Rutherglen perſhues James Riddell, preſent proveſt of their brugh, before the Secret Counſell, to the effect he may be puniſhed and cenſured by them for maleverſation in his office. The articles libelled ware, that he wronguouſly, and at his oune hand, emprifoned ſeverall of the burgeſſes of the toune,

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<sup>1</sup> *Viz* the apparent collusion, and that there was no penury of witneſſes, it no being *crimen occultum*.



and fined them ere he would set them at liberty; that he took bribes to do what he was obliged to do by his office; that he gave decreits condemnator, whair by the deposition of the witneffes he should have affoiled, and affoiled whair by the depositions he should condemne; that he profaned the Saboth day by drinking openly the tyme of divine service, and scoffing such as came from sermon, and saying, he got more good of the aill he had been drinking, then ever he got of preaching: item, for dighting and riddling his malt on the said day, and for contemning the King's birth-day, and not causing it to be observed, with many other deids of oppreffioun and profanenes. He did not deny the said deeds, but studied to diminish them by some qualities, as that he emprisoned none but such against whom their ware decreits, and acts of warding, issued out, &c. The Lords fand the complaint relevant, and admitted the points of it to their probation. Their ware very great presumptions for making it appear that he had overacted; yet it was thought a ticklish proces if seditious and mutinous burgeses ware heard thus way to stage their magistrats the very tyme of their office, which tends to the contempt of authority, and might be made a precedent for far greater maters, and that the Convention of Borrows would have bein more proper judges of it then the Counsell.<sup>1</sup>

29 Junij 1671.—In the cause of the Provest of Ruthglen, at num. 179, A. fol. 100, the Lords of Secret Counsell considering the probation, deprived him <sup>No. 184.</sup> from his office.

29 Junij 1671.—Young Drum Somervell and his spouse, George Gra- <sup>A. fol. 100,</sup> hame's daughter, ware pershued by Captaine Rind before the [Secret] Coun- <sup>No. 185.</sup> sell for clandestine and disorderly marieng, contrare to the 34 A& of Parl. in 1661. The Lords, conforme to the tenor of the said A&, fined him in 500 lb., and commanded him to prison, their to stay for 3 moneths.<sup>2</sup>

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<sup>1</sup> By the Roman law, no magistrat could be perahued during the tyme of his office, *sed post administrationem depositam non debet excedere urbe per 50 dies. Quoniam Attachiamenta cap. ult. ibique Titulus in cod.*

<sup>2</sup> The 22 act in 1649 is yet severer.

A. fol. 103.  
No. 206.

7 Julij 1671.—Their is a declarator raised at the instance of the E. of Sutherland, against the Earles of Erroll and Marshell, for declaring that the Precedency, both in Parliament, Counsell, and other places, belongs to him; together with an improbation of all such writs as any way may instruct their antiquity beyond his, &c. *Vide infra* numb. 271.

A. fol. 115.  
No. 271.

24 Nov<sup>r</sup> 1671.—The haill termes of the improbation (mentioned *supra* at number 206,) at Sutherland's instance against Erroll and Mershell for the precedency being run, certification was this day granted against all patents of honor or other writs whatsoever, granted to the said Earles, which can any wayes instruct their precedencie, because they ware not produced; but for any other writs that could admingle the same, or collaterally speiks of the saids Earles, belonging to other persons, refuses certification against thesse; but thought the said Earles, *qua* Constable *et qua* Marshell, to have the place at leift, will not dip theiron, because Sutherland's summons is not against them, *qua tales*, but only as Earles; so that this contest was only for the Ladies their place, for the Constabulary and Marischalat being personall dignities, their Ladies take no place theirby, but the Countes of Sutherland, if he be ane older Earle, will take the place of them. It was judged a new practique to admit certification against patents, which are in publick *custodia*, and that the surest and most noble of all others, *viz'* the Records of Parliament. *Vide infra* numb. 298.

A. fol. 124,  
No. 298.

16 Januarij 1672.—My Lord Erroll's proctors having stopt the certification (granted *supra* at num. 271,) against all patents of honour or other writs granted immediatly and directly to himselfe and his predecessors, Earles of Erroll, in so far as they could instruct precedency before Sutherland, and they being of new heard upon that point, it was alledged, for Erroll, that no certification could be admitted, because patents of honor ware not the subject matter of improbations nor certifications, unles the pershuar laid claime to the defender's title of honour wheirby he and his predecessors are created or designed Earles of Erroll, which is not the case; and, in ane improbation, the defender's and pershuar's rights and intreests most be in *eodem subjecto*, which is not heir, the pershuar's title of honour and the defender's being things quite different, and which may both subsist

as *res mere disparatæ*; and in ane improbation the pershuar and defender most both be pretenders to dominion in the thing concerning which improbation is moved, as, for instance, in improbation of rights of lands, the pershuar most libell he stands infeft in thesse lands, and the defender's rights called for most be rights of infeftment, or such rights as may affect the lands wheirin the pershuar libells he stands infeft, else his title will not be sustained, nor any certification granted, and the only proper way to pershue precedency is by a declarator. Replied,—Tho the pershuar and defender's title ware different things, yet he had good intres to pershue this improbation, because precedency, which consequentially arose from their patents, was the subject matter of the debate. Sie the answers to this and the other replies in the Information. The Lords (*totis viribus obnitente Præfide*,) found such writs as patents and the like ware not the subiect matter of a certification, because the pershuar's and defender's rights ware not *circa idem*; and my Lord Advocat reasoned against the pershuar's consequentiall intres, that, if it ware enough to sustain the admitting a certification, then, by the same rule, a man only served air to his father might crave improbation or certification against writs granted by his goodfire or others, tho he is not served air to them, their being a good consequentiall intresse. 2<sup>do</sup>, A man infeft in a milne might, upon that ground, crave certification against the evidents of another milne near him, by which he finds himselfe hudgely greived and prejudged in the thirle or sucken of his milne. 3<sup>th</sup>, One man having a fair might by this account improve the writs of another heritor's fair, wheirby he finds his customes diminished;—and yet all thir are absurd.

8 Julij 1671.—The Comisars of Edr and the Shireff and his deutes A. fol. 103,  
falling in contest about that feat in the north side of the Hall, each of them No. 208.  
lying clame theirto as their oune, and the matter being brought before the Lords by a bill given in by the Comisars, the Lords found that before the building of the Parliament House they had different feats, and that they so continued till both the offices came to be in the persone of one, viz<sup>t</sup> of Claud Hamilton, in the beginning of the Englishes, who having done with the one Court, sat still and keiped the other; and that since

fyne the Shiref-Deputes have used that feat throw tolerance fra the Comifars, and theirfor finds they may ather take their ounne way for getting a new feat, or, if they please, they may fit doune and hold their court at 12 a cloak, when the Comifars are up. If their had been ane active Shireff, (he being both far more honorable and far more ancient than the Commiffariot,) it may be thought he would not have loft the Interloquitor.

A. fol. 105,  
No. 225.

About this tyme [27 Julij 1671,] was Mr. Archbald Beith, the minifter of Arrane, pannelled for shutting [shooting] a man in a boat that was come from Ireland. The defence proponed for him was, that by A& of Secret Counfell, all the liedges of what quality foever, (out of which generality he, because of his office, could not be excepted,) are not only empowered but commanded, to feaze upon all veschells importing wi&tuall or other prohibited goods from Ireland; and in caise of refiftance to fink the fame, which, out of all doubt, gives alfo a power to kill in caise of opposition; *Igitur*.<sup>1</sup>—It was continued till November nixt.

A. fol. 105,  
No. 226.

27 Julij 1671. In Sir Androw Ramsaye's bufiness about the sale of the Bas to his Majestie, the King's Advocat was induced to attest the disposition made by the Proveft to his Majestie of that Ile to be a sufficient security, and that the Proveft had a valid and good right theirto, under his hand; tho he alledged, it was a thing no Kings Advocat ever before him had been in use to do, yet he would say nothing verbally save what he would alfo give under his hand.

A. fol. 106,  
No. 231.

About this tyme, and after, their was a great rumor about the changing of the Dyets of the Session, by taking away the 2 moneths of Summer session and adjecting them to the Winter, which was thus to fit 5 or 6 moneth together, and all the remanent of the year to be vacance. Much was plead for the conveniencie of such a alteration, but if the inconveniences that would ensue theiron be alfo impartially weighed, in my judgement

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<sup>1</sup> Yet the S. Counsell hes exp ained their ounne act, that it means only to sink the cargo or meall, but not the men.

they præponder; for 1<sup>o</sup>, *Omnis mutatio etiam in melius est periculosa, et in rebus novis constituendis evidens et summa earum utilitas esse debet, antequam recedatur ab eo jure quod diu æquum visum est: l. 2. D. de constitutionibus principum*; and our predeceffors who modelled a Summer and a Winter seffion, ware every whit as knowing and as rationall as we.<sup>2</sup> 2<sup>do</sup>, If the Seffion fit doune on the 1 of October, then ye call in the liedges to Edenbrugh in one of the throngest moneths of harveft that they have, which by law is ever appointed to be feriat tyme: *l. 1 per totum D. de feriis, item toto Titulo Codice*; and tho within theffe 15 or 20 years we have learned from the neibhour English, to labour fooner, wheirby our harveft is more early then it was wont to be, yet their's no man will deny but the moneth of October (and this very year is a demonstration of it) wins much of the cornes in Scotland; and the like inconvenience fhall follow, if ye take in the moneth of March, which is the hottest moneth for labouring the ground in the year. 3<sup>do</sup>, The weill of the kingdome's Metropolis, of the citie of our solemnities, most also be heir confidered, in sua far as it draws not with it any confiderable prejudice to the rest of the countrie; and Menenius Agrippa his Apologe to the Commons of Rome would be remembred:<sup>3</sup> the rest of the members will not do weill to withdraw sustenance from the belly upon the envious pretence, that they have all their severall functions and offices tending to serve it, and that it's idle, for in famishing it they'le famish themselves, and in what proportionall degries it decrefces fhall they diminish by theffe same. Edinburgh is the center wheir our gentlemen's younger children terminat for education,

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<sup>2</sup> And old customs, like old lived men, are presumed to be of a sound, equable, and wholesome temperament and constitution. By the Tounne Counsell books it appears, in 1630, endeavors were made by some for a change of the Sessions course, (tho I believe not this that's intended now): the Counsell writs to Mr. John Hay, their Commissioner at London, to deall with his Majestie stop the same.

. . . uat their being mewed up w<sup>in</sup> Tounne 2 of the pleasantest moneths in the year, and in effect that which is all the Summer we have in Scotland, is most destructive to our healths, and impeds hudgety the improvement men might make of their estates, and thesse who are at any distance, have no benefit of them at all, but most furnish themselves at Ed<sup>t</sup>; yea the Summer session is the cause of all our prodigality in apparell, housse mails, and otherwayes, yea its abolishment might be instructed would be 20,000 lb. sterling a-year in the liedges way.

<sup>3</sup> *Livius, lib. 2<sup>do</sup> pag. 27. Plutarchus in Coriolano: Florus, lib. 1. cap. 23.*

and by ane amicable reciprocation the circumferences of this center reaches againe over all the country ; and their be few gentlemen in Scotland who have not some intres theirin, either by being ishued originally theirfrom, or by having some of their twigs engrafted theirin, so that its deservedly accounted the *communis patria* of all Scotfmen ; and hence the testaments of all dieing out of the countrie are confirmed their ; persons furth of the country are summoned their, and such like.<sup>4</sup> Yea, what priviledges and badges of soverainetie Old Rome had, the same, by common consent of all nations, have bein stated upon the respective metropolises of kingdomes ; now to fetch so intolerable a prejudice (as this would prove) upon Edinburgh, for satisfieng the lust and pleasure of some few pretending themselves to be interestet theirin, ware a thing immeasurable unjust, and which in no æquity can be craved ;<sup>5</sup> especiallie considering that the wholle country, within 30 or 40 miles of Edinburgh, yea the wholle north and south, the one for their lambs, and the other for their cornes and ky, would be so far from having any benefit from such a change, that, to the contrarie, the same would redound hudgely to their losse and disadvantage, in so far as their would be no such consumption of victuall and thesse other abovementioned commodities in that case as now, seing bear and ale are most drunk in the Summer ; and if the Seffion late onlie in Winter, all who could reach wine would rather drink of it ; yea by it the King would be hudgely prejudged in his customes of wine, cloath, and filks, for which their would be no such vent as is now ; but the King hes dispenced

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<sup>4</sup> *Vide infra*, num. 387, in the duply. [Edinburgh case.]

<sup>5</sup> See 16 reasons against the taking away the Summer Session in a paper besyde me, drawn by way of information for the Members of Parliament in August 1681, tho the Parlia<sup>t</sup> then, by their act, without respect to thesse reasons, took the Summer Session away.

That its absurd to think a nation for the space of 6 or 7 moneths together should want a visible form of a Supreme Court of Justice.

Yet they pretend the Toune of Edinburgh will have no prejudice, because the winteners declare they had rather have one moneth more in winter, then the tuo moneths of Summer Session. 2<sup>do</sup>, This orderly way of discussing causes by the book enrolment, will demonstrate, say they, the unnecessarines of the Summer Session, since the 4 moneth of winter, at leist 5, will discuss all the causes in . . . . . us in a short tyme to rising at ij a cloak for want of ado ; especiallie that part of the regulations being observed, that no causes within 200 merks be pershued in the first instance before the Lords.

with his part of the losse by the sumptuary law now past. 4<sup>th</sup>, The spirits of men, like to bows, if they stand in continuall benfell, they slack and spoile; and, theirfor, the very four moneths of the Winter session as it now stands, ware judged to long for the Lords and Advocats heads to run constantly on buines, and the Zuille vacance was introduced, not so much upon a principle of religion, as for a relaxation to men's minds; and if the lenth of 4 moneths afford *tædium* and lassitude, whow much more if it ware 6. 5<sup>th</sup>, If a man suspended a charge of horning in January or any of the moneths ensueing, he might, by this new modell sing a requiem to himselfe till that time 12 moneth, for sooner *per rerum naturam* it could not be heard; but, as it stands now, such suspensions may be got discuft in the Summer session; sicklike, if I wairne a tennent to remove at Whitson-day, I could not by the said overture get the legality of my warning declared, nor a decreit of removing sooner then Nov<sup>r</sup> or Dec<sup>r</sup>, wheiras now I may have my decreit in my hand ere the last of July. Nather salves it the inconvenience to say, I may pershue thesse things before the inferior judges who sit at all tymes; for 1<sup>o</sup>, their be many actions to which they are not competent; 2<sup>do</sup>, in the rest the defender will ather procure them advocated or suspend them; now, whow great prejudice the liedges may sustaine in the delay of their actions which merit summar proces, is very conceiveable,—I shall only give one instance: Conforme to the late Act of Parl. I charge my debtor to the effect I may thereafter comprife and come in within year and day of some anterior comprifors; the debtor gets my letters suspended simplie, (which will comprehend a suspension of apprying as weill as of personall execution,) ere I get the suspension discuft, year and day expires, and so I losse my diligence, and the benefit of the Act of Parl. anent comprifing within year and day, and will have right allenarly to the reversion. I think the debtor's dole and *mora* in suspending, ought not to postpone his diligence. 6<sup>th</sup>, *Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est: l. 35. D. de Reg. juris: Igitur*, the Diets of the Session being establisht by ane continued series of Acts of Parlia: renewed from tyme to tyme, the same cannot be altered by our Lords Regulators, nor by the King, except in face of Parliament assenting theirt. 7<sup>th</sup>, Tho it appears by Act of federunt on the 20 of Januar 1586, and other places, that the Diets of the

Seffion have bein otherwayes conftitute then they are now, yet they cannot fay but their was ever a Summer feffion. And the Regulators would remember, that they have wronged the Toune of Edinburgh eneuch already by their regulations, (and by nothing fo much as that of the enrolment, tho a fecret ftroak,) tho they do not this additionall wrong too.

A. fol. 116,  
No. 272.

Novembris 24, 1671. When I confider with my felfe the fmall beginnings of the Colledge of Juftice, with the then Lords their mean falaries, and compares it with the great bulk they have fwelled to now, it feimes to deferve its oune rounge that we take a litle notice of the progreffe. The firft thing that ever was doted to them was the fomme of 1412 lb. Scots yearly, impofed upon all the benefices and prælacies within the kingdome,<sup>1</sup> condefcended unto by the Pope and churchmen, in regard, by the erection, the Prefident and the halfe of the Lords ware ordained to be of the Spirituall eftate. This was called the contribution money, and is exprefly ratified by A& of Parl. of Q. Marie's, in 1543; and whow it was ajufted of old, appears by the A&s of federunt at the 2 of Aprill 1586. It yet continues; and what every Lord's proportion falls to be, ye may learn from the federunt books on the ij of June 1663; and, in the old federunt Registers, their are many bonds of cautionry given in by the Prælates, Abbots, Commendators, Prioreffes, Lords of Erections, and other poffeffors of the great benefices, for the punctuall payment of the contribution due to the Lords furth of their benefices. Thus the Lords continued till the 18 of Februar 1562, having fcarfe 100 lb. the piece; at which tyme the Quean (as appears by the books of federunt) promifes faithfully, by hir letter, to augment the Lords gages; for implement wheirol, on the 13 of Aprill 1564, by hir gift, fhe grants them of additionall falarie 1600 lb. Scots to be uplifted out of the Quots of Testaments confirmed by the Comifars, who ware then but newly erected, upon the fuppreffion of the Officialls; for the making of which gift effectuall, many confecutive a&s of federunt ware made, (as appears by my fummaries;) as alfo for eviting fraudulent confirmations, and forceing thoffe who ware unwilling to confirme. The efcheits of all who ware denounced for not confirming, ware

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<sup>1</sup> Sie the originall of the Colledge of Justice, deduced *ab ovo*, elſewheir beſyde me.



gifted to the Lords by ane a&t of the ij of Dec. 1579 ; and the hail power of choifing the Comifars, and their officers, was devolved over on them, *ut paffim patet ubi fupra*. I find alfo at the 18 of Nov<sup>r</sup> 1583, they had 40 fhilling payed to them by him who tynes the plea, conforme to the A&t of Parliament theiranent, *viz'* the 49 a&t *in anno* 1471, which was renewed by the 43 A&t in 1587 ; and I find they came only to exa&t it in 1567, by ane A&t made by them on the 12 of Nov. the faid year. Thus things flood till the year 1609, that Bifchops being reftored to their former dignities and priviledges, then, by the 6<sup>t</sup> A&t of that Parl., the Quots was tane from the Lords, and given again to the Bifchops ; and in lieu theirof, by the j A&t of that fame Parliament, 10,000 lb. is diffolved yearlie from his Maj. cutomes, and gifted to the Lords. Then in 1633, a&t 22, their is 40 fhilling laid upon every pound land within the kingdome, to be lifted at 4 feveral termes, and then to be made up in a flock, and put out in annuel rent, for the ufe of the Lords of Seffion : and, by the 26 a&t of the fame Parl. the former a&ts, allowing them 12 pence of the pound in any decreit, are explained, that it fhall be payed not by the obtainer, but by the other partie. Then fentence-filver was abolifht by A&t 55 *in anno* 1641 ; which Parliament was *funditus* refchinded in 1661. Heir they flood till his Maj. happie reftoration in 1660 ; and then by the 50 A&t *in anno* 1661, their is a flock of 12,000 lb. fterling granted them, to be uplifted of the countrey by way of taxation ; and that, becaufe the 20 penny of fentence-filver tane away as ane unæquall burden laid on the purfhuar, (tho we have fein the contrare by the 26 A&t in 1633,) and that their was not 100 lb. Sterling to give them a peice. Then, over and above all theffe former grants, his Maj. added 10,000 lb. Scots *per annum* more, to be payed them furth of the readieft of his cutomes ; and that by the 7 A&t *in anno* 1662, wheirof they had a promife from my Lord Middleton, then Commiffioner, on the 4 of June 1662 ; all which donations conjoyned, makes to each of them 200 lb. a year.<sup>1</sup>

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<sup>1</sup> In 1672, it was noiced the Lords ware to get a gift from his Majesty, for augmentation of their salaries of all the few maills and few fermes of the fuperiorities of kirklands throw Scotland, which, by act 10 in 1633, are declared redeemable from the titulars, and poffeffors, by

From the admissions of Mr. David M'Gill of Cranston-riddell, and of Mr. Thomas Hamilton of Drumcairne, in his Hienes Advocats, the one on the 27 of June 1582, the other on the 14 of Februar 1595,<sup>1</sup> I find the King's Advocat had 40 pounds Scots of fie and salarie paid him yeirlie out of his Majestie's chekker; as also by ane act of the 3 of March 1595, they had right to the King's halfe of all confiscations and penalties imposed upon any partie in Improbations, whether be way of action or exception.

A. fol. 120.  
No. 287.

8vo Decembris 1671. *The Archbishop of St Androis, contra Patrick Lindsay of Wormeston his Comisar.*—This was a pershuit against the Comisar for releiving the Bischop of 303 lb., as his proportion of the contribution money due to the Comisars of Ed<sup>r</sup>, of all years since 1661, and in tyme coming. Alledged, their can be no releiff, because they have never bein liable theirin *de facto*, nor in law can be; nather by the Decreit arbitrall are they, but the Bischops themselves, burdened with that 900 mks. of augmentation given to the Comisars of Ed<sup>r</sup>, upon the accompt of the losse they sustained throw the want of the great Testaments; and as for the old duety, which was 1200 mks. payed to them, the subject matter of that was ever the Quots, and when the Quots was in Q. Marie's hands, and after given to the Lords of the Seffion, this 1200 mks. was ever payed furth their of. As for the Act of Parl. 1609, and the Injunctions following in 1610, and the late Injunctions in 1666, ordaining the Comisars to releive their Bischops of the contribution money, they can never bind this defender, because the Injunctions 1610, did not keip within the bounds limit for them by the Act of Parl. 1609, which was only to set down the manner of the Comisars proceeding with the formes of proces, and in so far as they deviat from that, they are without a warrand. 2<sup>do</sup>, The said

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his majesties payment to them of 1000 mks. for ilk chalder of few ferme they be so many nobles and gentry concerned in this that . . . . . prove a dangerous point. If the Lords of session deserve enlargement of their fees, from the country whose priviledges they are so carefull of, &c., I shall not determine.

<sup>1</sup> Sie the sederunt of the 8 of January 1583.

Injunctions 1610, ware never *in viridi observantia quoad* this releiff. 3<sup>do</sup>, The Injunctions 1666, are since the defender's gift and *jus quæsitum*, which cannot be burdened without his oun consent. 4<sup>to</sup>, The most that all thesse Acts and Injunctions can infer is, allenarly, that the Comisar releiff him of his proportion of the 900 mks. of augmented money; but their's no ground for relieff of the old duety, which was ever payed out of the quots, and so by the Bifchops who received them. Sie the answer to this in the Informations, as also about the Bifchop of Glasgows decreit against his Comisar, and the Act of Parl. procured by the Comisars of Edr for paying their fees out of the Bifchop's rents. After many hearings, the Lords, before answer, ordained the Decreit arbitrall to be produced: then the matter was tryfted; the Comisar was content to releiff the Bifchop of the wholle for the future, and the Bifchop was to procure to him a generall discharge of all bygains from the Comisars of Edr.

In January, this seffion, was called the a<sup>c</sup>tion pershued against the Toune of Edr by James Dundas and others, the creditors of Park Whythead, for payment of their respective debts; because he having bein incarcerated within their Tolbooth of the Cannogate, he had escaped. Against which it was alledged, that the 173 A<sup>c</sup>t of the Parl. 1597, appointing all Brughs to have sufficient goalls for detaining of prifoners, most only be understood Brughs Royall, (who, in regard of the many priviledges granted to them by the King and his ancestors, most not complaine of this burden imposed on them,) but nowayes of brughs of regality, such as the Cannogate is,—that brughs of barrony first are not bound to accept the King's rebells offered to them—nixt, tho they receive them and let them escape, yet they are not liable for the debt. *Vide* D. 13 Martij 1623, Moody *contra* the Bailzies of Dunc; *item*, 12 Febr. 1624, L. Langton *cont.* the Bailzies of Dunc; *ergo*, the same most obtain in a brugh of regality, their being no assignable disparity. To this it was answered, whatever exemption brughs of regality may pretend to of being frie ather to accept prifoners or not at their pleasure, (which is not leasum to brughs royall,) but *eslo*, it be *voluntatis ab initio*, yet having once accepted them it becomes *necessitatis*, and they most answer for them, else the liedges

A. fol. 131, b.  
No. 331.

should have no security ; but this needs not be reasoned now, seeing it was debate *in foro contentiosissimo* for the Towne of Falkirk against James Hamilton, merchand in Edenbrugh, in 1668, that being only a brugh of regality they could not be liable for the escaping of prisoners, and the Lords found, they were answerable for all they received ; and tho the same was alledged in behalfe of the Towne of Falkland, pershued *actione hac subsidaria*, by Mr. Ja. Cheap, yet were found liable notwithstanding. But for Falkland it seimes to be a brugh royall, as I observed *supra*, at number 132. My Lord Castlehill repelled the said alledgeance made for ther Towne, and ordained us to say farder. *Vide* the rest of the debate, *infra* num. 374.—Yet by the consequence of the decision marked by D. 21 March 1627, Earle of Cassils, tho none beneath bailies of regalities are lyable to obey thesse charges, yet they are, as also appears from the 19 of Nov<sup>r</sup> 1628, Ray *cont.* Douglas.

A. fol. 153, b.  
No. 374.

16 November 1672. In the subsidarie action, mentioned *supra* at number 331, pershued by Ja. Dundas and others, against the magistrates of Ed<sup>r</sup>, for suffering Park Whythead to escape out of ther prison of the Cannogate, the defence then proponed by us being repelled, we alledged, 2<sup>do</sup>, absolutor from this pershuit because nather fraud, negligence, connivence, nor insufficiencie could be any way qualified, ather against the prision, the jaylor, or the magistrates defenders, in so far as the manner of the rebell's escape was truly in law *vis major, et casus improvisus et fortuitus*, which could not be obviat by common human providence, and which the magistrats *non tenentur præstare*, in so far as the Tolbooth of the Cannogate is most sufficient, and in the same condition it hath bein now past all memory ; that this rebell was kept with more jealousy and strictnes then any other prisoners for civill debt ware ; that the manner of his escape was by winning into the bell-houfe, and towing himselfe down from a window theirol, 5 story hy, which no rationall man that had any regard to his life would attempt. To this it was replied, that in his escape the negligence and carelesnes of the keepers did no les evidently appear then did the insufficiencie of the jayll ; for 1<sup>o</sup>, the jaylor was advertised of his designe to

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<sup>1</sup> *Vide infra*, numero 473, Captain Martin.

escape, and theirfor was required to keip him in the iron-house, and which he obeyed not; 2<sup>do</sup>, it was a palpable negligence that he suffered tows to be brought in to him; 3<sup>to</sup>, it was blameable that he permitted him to have acces to the bell-house; 4<sup>to</sup>, as also, that ather he should have got the key or its impreffion; 5<sup>to</sup>, the prifon's weaknes is clear in this that his escape was made without the least violence done ather to door, window, or wall, and so cannot be termed *vis major*; 6<sup>to</sup>, its insufficiencie is yet farder demonstrable that their was no stanchells in the window out at which he escaped, and that they have stanchelled it since; and that a woman imprisoned in that Tolbooth, for being suspected as accessorie to the murder of Mr. Bedford in Leith, escaped furth theirat of before, and so could not be such ane desperat attempt as was never undertaken; 7<sup>o</sup>, their was no such hazard in the deschent as was represented, because their is tuo flat rooffs in the way upon which they may rest in the doune coming. Sie all more fully in both parties Informations. My Lord Castlehill, before answer to the relevancy of the debate, and mutuall condescendances made by both parties as to the manner of the escape, ordained them both to adduce witnesses for proving the points of their mutuall condescendances, (for tho conjunct probation be very dangerous, yet in defences and replies simply consistig *in facto* as this, its both ordinar and just.)<sup>1</sup> I delt extreemly to have had it allenarly, ane a& before answer as to the wholle, both our first defence founded upon its being only a brugh of regality, and this 2<sup>d</sup> founded on the casuall way of the escape, and not to have bein in ane a& of litiscontestation; but the pershuars opposed it, that so they might get us bound in ane a& of litiscontestation, and I could not prevail, in regard defences consistig *in jure* cannot be reserved before answer, but their relevancy most ever be discuffed and premised to the probation of points standing *in facto*. The probation being closed, and in the beginning of November 1672, being advised, and the Advocats called in, and the pershuars having resumed the cause and enlarged the articles of negligence and insufficiency afforsaid, it was answered for the

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<sup>1</sup> And which the Lords requires oft in such cases, sie D., 6 of July 1631,—*cont.* Bailzies of Perth, w<sup>t</sup> its marginall citations, and which might have bein pertinently urged in this cause.

defenders, That the ground and foundation of this subsidiary action in law is ather the insufficiency of the prison or the neglect and default of the keiper. As to the 1<sup>st</sup>, it was weill knowen, that the Tolbooth of the Cannongate had bein a most sufficient prison, past all memory, and few better in the kingdome, and wheirin hundred of prisoners for civill debts, and malefactors upon criminall accompts, have bein safely detained and never able to make their escape; at leift it was now, and at the time of the rebells escape, in the same very case and condition, and als strong and as weill in repair now as it was at the beginning or hath bein at any time since past memory. As to the 2<sup>d</sup>, their's no qualification of negligence can be justly enforced upon the jaylor, for it cannot be instanced that ever a prisoner for debt did attempt so dangerous ane escape; and as for the woman they instance, 1<sup>o</sup>, she was imprisoned for a capitall cryme; 2<sup>do</sup>, in the escape she fell and so bruised her selfe, that w<sup>in</sup> few dayes she dyed:—And as to the bringing in of ropes, it's supposed to be proven by the witneffes depofitions that they ware knit together of many peeces, the inbringing wheirof no keiper of prisoners for civill debt could obviat or remeid, seing they may bring them in unto their breeches, or wrapt about their waft; and no keiper hath power to searh them, tho he did suspect them, as he cannot probably do; likeas he can hinder none from having acces to such prisoners; as to the window from whence he came, it was ordinar for prisoners to escape even out of the Castle of Edenbrugh, and yet none will think the Castle ane insufficient prison for all that; that the measures of thesse things ware not to be taken from what desperation and hard usage might prompt one man to, but the generall rule of law was what the most of men, or a rationall man would undergo in such a case: That the rebell, concerning whosse escape they now controvert, was driven to that despair by the unusuall strictnes and severity of the pershuars, in causing keip him in the iron house<sup>1</sup> as if he had bein ane malefactor, so that the keiper is so far from deserving censure for his remissenes, that if he ware to be punish't at all he rather deserves it for his crueltie to him, and which he used by some of the pershuars their instigation allenarly; and

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<sup>1</sup> We caused make a most diligent search for finding out the rebell, that so we might have sisted him againe *in eadem causa*,—yet the Lords have never sustained that as sufficient to assoilzie

hoped it was clear, by the witnesses adduced, that he was better and more narrowly watched than any other prisoner. Likeas the witnesses adduced for the Toune are far more famous and honest persons, and to whom more credit was to be adhibit as more pregnant and knowing than the persuuars, in so far as some of them were fellow prisoners w<sup>t</sup> him at the tyme of the escape. The Lords upon this debate, (which was on the 9 of Nov<sup>r</sup>;) and after consideration of the testimonies, found no fault nor negligence of the jaylor, and theirfor affoiled him and the magistrats upon that accompt; but before advising of that member of the insufficiency of the prison throw the not stauncheling of the window, wheirat the rebell escaped, they ordained the Lords Colinton and Newbayth to visit the said prison window, and to consider if a prisoner might, without danger, make his escape furth of the said window by the help of tows; and they to report their opinion thereon. We were very glad at the gaining of this step, taking it for a good omen to the wholle cause; but we did not at first discover my Lo. President's designe and draught in it:—He had been strongly solisted by his Ladie in behalfe of Daniell Rose the keiper; therfor, for securing of him, he past the first part of the Interloquitor affoiling him from all fault, but resolved in the last part to ensnare the Toune, and find them solely liable for the debts upon this ground of the prison's being insufficient, and this to gratify the Dundaffes, for whom Sir Jo. Dalrymple and his Ladie agented shamefully. But when we felt his breath, it made S. A. R[amsay] bestir himselfe more actively w<sup>t</sup> the rest of the Lords to break the President's project, and who was concerned for reasons of state to see it succed weill, his ennemies at that tyme, as S. G. L[ockhart] told me, lying at a wait for this advantadge against him, yea wishing and solliciting the Toune to lose the cause; whowever, bouls rolled

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magistrats. So Dury, 27 Martij 1623, Smith, and 22 Januar 1629, Scrimgeour, tho the same be downright contrare to the common law, L. 8, p. 9, D. *de penis*. *Carcer ad continendos homines non ad puniendos haberi debet*: but our reason in making the prison a part of the punishment is, *ut aequalore carceris*, they may be at lenth forced to pay their debt; but if this were a good or adequat argument, then, to make it truly irksome and loathsome to debtors, prisons should only be built in most noxious and unwholesome airs, their dyet should be restricted, and all other severe courses followed that may render their life grievous and wearisome to them. L. 2, C. *de exactoribus tributorum*.

fo weill, that whither throw importunitie, or throw a timoroufnes of nature, the forsaids 2 Lords reported verballie this 16 day of November, that their was hazard in the deschent, tho the pershuars and fundry others offered to go out at that same window, and come down without the leift hurt or cause of fear of danger; wheirupon the major part of the Lords affoilzied from the haille libell. When the cause was first consulted, S. G. L. was mighty diffident of it, abusing Daniell, and telling<sup>1</sup> it was impossible but the Toune would tyne it, and be found liable, and recommended to me to fie [that] the debts, hornings, captions, and arrêistments ware clear, that as litle debt might be fixt upon the Toune as could be: yet Mr. G. Norvell had ever hopes of it. But we had so good a care of the probation, and manadged it so dextrously, that when we came back with the depositions to him to advise, he became more confident, and asserted, If the Lords judged aright and considered all the qualifications of diligence proven, and especially that the prison, tho it ware insufficient, yet that it was in as good case now as at the first building or ever, they could not but affoilzie. The President was in a great chaff, pretending the absolvitor was contrare to all law, and that if such slender grounds as thesse ware sufficient to frie and acquit magistrats from thir pershuits, their should never be magistrats found liable to the world's end; and that in the like cases their hes bein stronger condescendances made and more pregnantly proven for defenders, and yet they condemned; and theirfor would not infer it as a pratique in his book he was composing of his daily observes. The judgement and censure of the advocats upon this decision was various, (as it's in most other cases,) but many condemned it as strange and dangerous.<sup>2</sup> Incaise we had lost that part about his casuall escape, we was resolved to have recurred and quæstioned the relevancy of that pairt of their fumonds, wheirin they craved<sup>3</sup> not only the jaylor and bailzies of the

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<sup>1</sup> That the jaylor is liable by the common law, *vide* l. 4 c. *de Custodia reorum*, yet that law seimes only to be anent malefactors.

<sup>2</sup> We was also resolved to have craved absolvitor from annuelrents since the horning, on Durie's decision, marked 29 June 1626, Haliburton, &c.

<sup>3</sup> *Pœnæ depensæ non solent repeti*, *Leges* 42, D. *de conditione indebiti*, and so the bailzies of the Cannogate could never in law have recurred upon the magistrats of Ed<sup>r</sup> their constituents.



Canogate to pay them their respective summes, in respect they had suffered the rebell to escape, but also the provest, bailzies, counsell, and commonty of the burgh of Edenbrugh, as Lords Superiors of the said regality and barrony of Canogate, and from whom the bailzies their of derives their power, authority, and jurisdiction, and so are liable for their maleverfation; and also as the persones from whom the said jaylor hes his commiffion, and to whom he hes found caution, and so most answer for his negligences and omiffions; and which was intire unto us in respect of a reservation, contained in the act of litifcontestation, of all our other defences, which I think was scarce regular,—but we ware not put to this dead lift.

*Anent the Toune of Edr's Charter in 1636.*—About this tyme [9 Feb. A. fol. 129, ruarij 1672,] I had occasion to fie the Toune of Edr their great Chartor, No. 322. granted to them by King Charles in 1636, with the seafine tane theiron in 1637. It's a new gift to the Toune of their brugh milnes, common moore, port and harbery of Leith and Newhaven, superiority of Leith, dock-money, anchorage-money, golden pennies, &c., office of shireffship and justiciary of peace, within their toune and liberties, &c., with a ratification of all their former infestments: as for the badges of honour and soverainety (so to speak) conferred on the Provest and other magistrats of the City,—viz', the sword, scepter, and rid robes, these are by the grant of King James the 6<sup>th</sup> by his charter under the Great Seall in 1621, and that on the parrallel of the Lord Maire of London. Many persones are of the opinion that this last Charter in 1636, hes done the Toune much more hurt then good, because it hes ather cut them of expressly from fundry priviledges comprehended in their ancient infestments, or prejudged them their of in so far as they are altogether omitted in this. I shall instance only one;—Craig, in *Dieg. de Regalibus*, pag. 117, tells, that the Toune of Edr, by a speciall priviledge, are indulged the escheat of all condemned within their brugh and liberties for slaughter; and, *idem*, page 121,<sup>1</sup> tells they have the power of having and reteining their oun fisek, yet, by the charter 1636,

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<sup>1</sup> *Vide Balfour's Practiques, Title of Burrowes, cap. 20.*

the escheits of all perſones condemned within the Toune are ſpecially referred to the King, and the Toune for ever excluded theirfrom.

See more of the Toune of Edinburgh's Charter in a 4<sup>th</sup> manuſcript marked A. 4, page 32.<sup>1</sup>

A. fol. 135, b.  
No. 344.

22 Junij 1672.—This following point went to Interlocutor :<sup>2</sup> Whither or no a *de novo damus* from his Maieſtie does not import to the waſſell receaver a diſcharge, liberation, and exoneration of waird, marriage, few dueties, and all other caſualties due furth of theſſe lands, preceeding the date of the ſaid charter. Tho this was lookt upon as a principle wheirin their could be no controverſie, yet it was alledged by ſome, that unles it ware ſuperſcryved by his Maj.'s oun hand, he could not be prejudged by ſuch gifts, and that the ſlouth or negligence of his Officers of eſtate could infer no wrong to him. *Vide* the 14 Act of the Parl. 1600. This is a miſerable and pittifull way of wenting our wit, by ſhaking the very foundations of law, and leiving nothing certaine. But the true ſourſe of all is from the wofull diviſions in the Houſe, eſpecially betuen the Preſident and the Advocat, each of them raking, tho from hell, all that may any way conduce to cary the cauſes that they head. *Flectere ſi nequeo ſuperos, &c. Vide infra*, num. 361, thir ſame parties.

A. fol. 147, b.  
No. 361.

9 Julij 1672. The Theſaurer-depute, as he who hes obtained the gift of the marriage of the late Earle of Dundy, which marriage exiſted throw the deceis of the Lord Dudhope, father to the ſaid Earle, perſhues declarator for the avall of the ſaid marriage againſt my Lord Dundie's wholle creditors. In which action, it was alledged for the Earle of Northesk, that no marriage could be declared againſt him, nor could the avall theirow (whatever the Lords ſhall modifie the ſame at) ever affect the lands of

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<sup>1</sup> From the Counsell Books of the Toune of Ed<sup>r</sup> in 1629, &c. I find they had procured a chartor in 1603, with many ſtrange clauses and priviledges, viz<sup>t</sup> right of regality, admirality, right of the north Caſtle Bank as weill as the ſouth, and verie prejudiciall to the gentlemen of Weſt Lothian, which they were neceſſitat . . . . . It was ſore againſt the Toun's heart and will that they altered ther former chartor, but they ware forced to it.

<sup>2</sup> The parties in this ware the Earle of Northesk and others, and the L. Hatton, Theſaurer Depute.

Craig, which were transmitted to him by progres from the said Earle of Dundee, whoffe marriage was now fought to be declared; because upon the said Earle's refignation, and a signator superfcryed by his Maj.'s oun hand, he stood infest in thesse lands w<sup>t</sup> a *de novo damus*, which most import to him ane exoneration and discharge of all casualties, due furth of thesse lands preceiding the day and dait of the chartor.<sup>1</sup> The Lords found the *de novo damus* did not discharge this casualty of the marriage, because their being many casualties named in the said clause, viz<sup>t</sup>, wairds, releifs, non-entries, escheats, forfaultors, bastardries, recognitions, last air, &c. the marriage was not expresse; and as to the generall clause wheirby his Maj. gives, grants, and dispones the said land and all right, title, entres, or clame of right he hes theirt, by whatsomever manner of way preceiding the date of thesse presents, they found not that sufficient to beir a discharge of a marriage, because the King transmits nothing by thesse generall clauses, and he can give nothing away but what is specially named; that a *de novo damus* secures allenarly the property of the land, but does not secure against prior casualties, because his Maj. cannot be prejudged by the negligence of his Officers.

I never observed ane interlocutor so generally displeas as this did. I found no lawyer, nather great nor small, would oun or seik to justifie it, but all cryed out that the foundations ware shaken, the security of the liedges was overthrowen, all their rights ware branled; that the scruing up the casualties of superiority at this rate, would make the wholle kingdome think the King the worst and the unfurest superior they can hold of: It made all in mockery speir who was pershuar, and if he had a brother. My Lord Halton's oun advocats confest it was horridly arbitrary and unjust; Sir G. Lockhart, who was one of them, asserted that his goodfather would have quite his land sooner then past such an Interlocutor. I never heard it doubted but a *de novo damus* did cut of all bygains that they could never be fought, that it had bein ever so advised by all lawyers that because it excluded his Maj. from

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<sup>1</sup> The farther arguments that ware urged, especially from the practise in 1611, and Peirston's Practique in 166..., are to be sein in the Informations beside me.

all preceedings, theirfor the composition was raised considerably hier then what it used to be in ordinar cases wheir that clause was put in; that it past for an uncontroverted principle, (if so be we have any in our law,) that if a subje& superior give a chartor to his wassell with such a clause, it undoubtedly cuts him of from all he can clame out of that land preceeding its date; that a *de novo damus* is a originall gift, and hes all the words of a new donation, *viz'*, *exonerando, transferendo, et extradonando*; that the King gives the land by this clause *prout optimus maximus est*, and so frie from all antecedent encumbrances; that ther finding the marriage not to be discharged because not exprest, was nought save a filly evasion, seing tho not one of them had bein enumerat, they ware all cut of theirby; that the just bounds of all things ware confounded; that strange things ware hurried throw in Parl., and things as strange ware advised w<sup>t</sup> close doors in the Session, and reported again at syde bars; that no man talk of decifions after this; that all other decifions, tho blameable, could shreud themselves under some cloak of law, but this stood naked: none was found who would ather ounne or palliat it: That the leift they can modifie the avail to will be 20,000 mks., seing he got that in tocher w<sup>t</sup> Dalhousie's daughter; that he'll betake him to any one creditor he pleases, and affect his land theirw<sup>t</sup>, the same being *debitum fundi*, and will leive him to his releiff of the rest; that the pershuar being likewayes donator, and having the gift of *ultimus hæres* of the said Earle as his air, he most warrand the rights and infestments granted to them by his predecessor, and so this gift of the marriage can no more prejudice them then if the deceift Earle of Dundee, their debtor and author in the lands they possesse, or any to his behooff, had procured the same. That he may not renunce the same now to their prejudice, since he hes made use of it already. *Vide inf. num. 368.*

A. fol. 148, b.  
No. 368.

About this tyme, [11 Julij 1672] in the recognition pershued by the Lord Thesaurer-depute *contra* the Earle of Northesk and the other creditors of the Earle of Dundy, the Lords found the lands of Craig had recognosced in his Maj.'s hand, throw a disposition theirow made in *anno* 1659 by the Laird of Craig to Pitarrow, and a base infestment taken theirupon: notwithstanding it was alledged, 1<sup>o</sup>, That, *ante omnia*, my Lord Halton ought to make patent to them the charter kift which he had

got delivered to him, to the effect it might be tryed from the old evidents and chartors whither theſe lands held waird, yea or no, and which might furniſh them w<sup>t</sup> many other defences; 2<sup>do</sup>, that the diſpoſition made to Pittarow could never be the ground of a recognition, becauſe it was reduced, and *funditus* tane away in Parliament, which annulled it *quoad omnes effectus*, as if it had never bein; eſpecially ſeing it was reduced *ob defectum conſenſus*, it having bein elicited from him when he was drunk ſo extreemly that he had not the uſe of his reaſon; for the redu&ion of a diſpoſition of waird lands, and of a baſe ſeaſine tane theiron, becauſe of informality, not regiſtration or the like does not hinder the incurring of recognition, becauſe the waſſell *fecit omne quod in ſe erat*; yet if ſuch a right be reduced for want of conſent, then no deli& is committed,<sup>1</sup> (ſeing *animus et propoſitum faciunt maleficium*,) the waſſell is not guilty of ingratitude, and theirfor ought not to be puniſhed w<sup>t</sup> the tinfell of his lands; and it is the ſame as if ane idiot or furious perſone ſhould alienate waird lands without his ſuperior's conſent; in all which caſes, *animus delinquendi præcipue ſpectandus eſt*.<sup>2</sup> The Lords, before anſwer to this alledgeance, ordained the grounds and warrands, and other minutes of that decreit of Parl. in 1661, to be produced before them; (tho I cannot ſie what power or right they had to call for the warrands of a decreit of Parliament, or to try and canvaffe upon what grounds the ſame proceeded, and if they ware warrantable and rationall): and on peruſſall of the depositions of the witneſſes wheirupon the ſaid decreit proceeded, they repelled the defence, in regard it appeared from the teſtimonies that Craig's drunkennes, the time of the making of that diſpoſition, was not ſo deip as that he was wholly bereaved of ſence and reaſon, but that he acted by a will and conſent, tho not altogether ſo clear. 3<sup>do</sup>, It was alledged that it was granted the tyme of the Uſurpers, when all waird holdings were diſcharged, or it was agriable to the A& of Parl. in 1641, then ſtanding unrefſchinded, which appointed all ſuch lands to be holden feu; and betuixt the tyme it was granted and the tyme of its being queſtioned in Parlia-

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<sup>1</sup> *Vide oðo [omnino] Craig, lib. 3 pag. 344.*

<sup>2</sup> Sie the Informations beſide me, and *ſupra* nu. 361, *item infra* page [num.] 372.

ment and reduced, their ware no judicatories fitting wheirin he might have obtained it confirmed ; likewayes, if it had not bein annulled by a decreit of Parliament, he would have obtained a confirmation theirow long before the date of the pershwar's gift of recognition, and so would have excluded the same.<sup>1</sup> Notwithstanding of all thir defences, the Lords found the recognition of the lands of Craig incurred.

As for the barrony of Dundie, it was alledged, that the deeds founded on could never infer recognition theirow, seing they ware far w'in the halfe of the said barronie as to it's ancient extent. Wherunto it was replied, that in the computation of the totall of the barrony no lands wheirow their was publick infestments granted, ather by resignation or confirmation, could be repute a part of the barrony, because they ware theirby dismembred, and the remanent could only be esteimed the barrony, the major part wheirow was alienat. Duplied, The Earl of Dundie retained the *dominium directum* of thesse lands, and they behoved still to be repute parts of the barrony, &c. The Lords found, the alienation of the major part of the lands remaining unresigned and unconfirmed made thesse parts of the barrony to recognosce, and theirfor repelled the alledgeance. But the truth is, the Lords ware so staid at this tyme, that hardly any thing could have bein proposid against this recognition,—over the belly wheirow they ware not inclined to go.

A. fol. 150, b.  
No. 372.

November 1672.—In the declarator of recognition mentioned *supra*, numero 368, pershued by my Lord Thesaurer Depute agt the Earles of Northesk and Weimes and fundrie other persons, it was alledged for Weimes, that no declarator could pas in his prejudice, because he stood infest in ane annuelrent furth of thesse lands confirmed before the gift of recognition. This defence at first proponing was found relevant, but theirafter it having bein answered by the pershuer, that they behoved to say confirmed before the incurring of the recognition, wheirupon the gift is grounded, the Lords repelled the same in respect of the answer or

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<sup>1</sup> As also, notwithstanding it was alledged that Pittarrow was Craig's appeirand air, mediate at leist, to whom alienations do not infer recognition : *vide* Craig, pag. 345 ; This was repelled because old Pittarrow was the immediat nearest air : sic Hadington, *penuit* Februar 1612, *Rae contra* Keltie.

reply, (*viz* Pittarrow's base feafine in 1659). Wheirupon Weymes having applyed for a new hearing, it was moft contentioufly debate, whither or no ward lands could recognofce in prejudice of a infeftment confirmed before the gift, but after the deli& and forfaultor of recognition was committed by the undue alienation of the faid lands without the fuperior's confent. Wheirin it was alledged for the E. of Weymes, that the common law, our laws and A&ts of Parl., Craig and all that wryts *de feudis*, the Lords conftant tract of pra&tiques and decifions, the univerfall opinion of all lawyers, and the fecurity of the liedges, (which heir ought to be *suprema lex*,) feimes to have fetled this, fo far above all the rationall limits of a juft contradic&tion, that to heir it now drawn in quæftion ftrikes us all with amazement, doubting wheir fuch fcepticifme may end, and if this arbitrary latitude of ranfacking principles will leive us any thing fixed or certaine at all;—That upon the faith of theffe laws all the fubjects of Scotland have hitherto refted, ever underftanding and fupposing that a infeftment confirmed before the gift was moft fufficient in law to fecure that infeftment againft any recognition gifted after the confirmation, tho the grounds of the gift fhould be prior to the confirmation, elfe all the ward lands of Scotland fhould be now found open to recognitions, the interefts of the people fhould be branled and prejudged, and a door opened for drawing all their rights under hazard and quæftion; that his Majeftie, by granting a confirmation, doth confent to the waffell's right, and fo can never quarrell the fame upon any preceeding recognition, wheirby the property of the lands was returned to his hands, that *confirmatio illius qui dare potuit eft donatio*; that confirmations are the ordinary way for fecuring rights againft the hazard of recognitions; that Craig, *Tit. Quibus modis feudum ob delicta amittitur*, (pag. 347,) is pofitive that any ratification, exprefse or tacit, as the fuperior's accepting a refignation and giving charter theirupon, doth purge prior recognitions; that the Lords have fo decided *in foro maxime contradic&torio*, as Hadington marks it at the penult of Februar 1612, in the caufe of Rae *cont. Kelly*, wheir this defence was fufained againft that recognition, infeftment confirmed before the date of the donator's gift, which is clearly the prefent defence, and yet the perfhuar's grounds he now infifts upon ware then urged and repelled;

as also, it was found relevant against a proces of recognition pershued by Sir G. Kinnaird in 1665, that the defender is *in damno vitando*, which excuses ignorance of subtilities, but the pershuar is *in lucro captando*,—the defender is founded in the common opinion of the wholle countrie, in unanswerable decifions, and in the uncontroverted authority of the most eminent lawyers, wheiras the pershuar hath no vestige of any authority, grounded only upon neu notions, innovations, and distinctions, which, if they ware sustained, no man could be secure for ane hower of his estate; and that this being *tentus et habitus* for law hitherto, the most that in any fence or reason can be done, if the Lords will alter ther former course, is to rectifie it for the future, but not to ensnare any who, upon the faith of so many combining grounds, have rested upon confirmations in tymes past. To which it was replied for the pershuar, That they acknowledged that a confirmation of a base right furnished a good and a sufficient interest to defend against and purge any recognition that could be inferred upon the ground of that infestment so confirmed, so that it could never be used either as a partiall or a totall ground wheiron a recognition could be craved to be inferred or a gift taken, as also, it would stand invincibly secure against anie recognition that should be incurred after the date of the said confirmation; but that it should sustaine against a recognition founded upon a distinct and seperat ground prior to the said confirmation, because forsooth, the superior had not gifted the same till after the confirmation, is ane assertion so bold and groundles, so frivolous and irrelevant as ever anie that was infisted on, and absolutly contrare to and inconsistent with his Maj.'s interest, and wheirin their is not the leift shaddow of a prejudice or inconvenience to the security of the people; for can their be anything more consentaneous to the principles and nature of feudall rights, then that wheir *feudum fuit commissum*, and the propertie of the lands was returned back to his Maj. by his vassells fault before the confirmation, that the said property should not passe from his Maj. except by one of thir 3 wayes, ather by consenting to and confirming of the same lease by which the recognition fell, or by a speciall disposition and gift of the recognition, or 3<sup>uo</sup>, by a *novo damus*; and that a naked confirmation of a seperat infestment can



in no law or sence be constructed a *habilis modus* to denude his Maj. of that right, that nather being *actum* nor intended unles the feiker of the confirmation had exprest his Maj.'s right; and so the King being certiorat of his oune right had willingly dispoñed the same, that thir defenders by the same rule behoved to say, that his Maj. passing infeftment upon a resignation or on a comproyving, should theirby purge and discharge anterior recognitions, seing it's most certain law, that infeftments passing by resignation and confirmation are *termini convertibiles* and *æquipollentes* in law, and produce the same feudall effects; and yet its grosse ridiculous and *inauditum* to imagine that his Maj.'s accepting of a resignation purges any anterior recognition, nather is their any who does affirme it; that the King having *jus perfecte quæsitum* by the illegall alienation made to Pitarro, any confirmation he gave thereafter to the E. of Weymes could not prejudge him, because *confirmatio nihil novi juris tribuit*, it's but ane act of course, and the common act of his Maj. as a superior, and bearing a salvo and reservation of all right, and so can never import such a consent as to dispoñe away a right never mentioned nor thought upon; that the 16 Act of Parl. in 1633, mentions no wayes for stopping recognition, but ather the superiors consent to the alienation or a confirmation therof; that it's so wain and foolish a imagination to think that his Maj. is prejudged and denuded by such confirmations, that no solid lawyer ever dreamed of it; so great a paradox is it, that the defenders understand not Craig, who is in the contrare opinion at page 347, in the case ther betwixt Grange Kirkcaldie and Pharnyharft's brother. And as to their strained praëtique in 1612, it meits not, because ther the infeftment confirmed was made use of as one of the partiall grounds of recognition, in which case the Lords did decide most justly that it should stay the recognition *pro tanto*; but that concernes not our point. As for the security of the lidges, the same is in no hazard, seing we have knowen wayes in law condescended upon as proper to stop the danger of recognitions, *viz'*, ather gifts of recognition or a generall *novo damus*, and which are ordinarily used; and no judicious lawyers, in advising securities, ever rested upon confirmations of a seperat right, and wheir it's clamoured that the contrare hath bein hitherto repute law, the same is denied, upon

the grounds we have represented; but *esto* it ware so, such errors and mistakes cannot be the rule for the Lords decisions else they should be very ridiculous oft tymes: w<sup>t</sup> many other things contained in the Informations which he besyde me. The Lords found the said infestment confirmed since Pittarrow's seafine, (which was the ground of the recognition,) tho long before the gift, could not defend against the recognition, but declared, in prejudice and notwithstanding their of.

All who understood law and the former practise of the bench, ware much affected at this procedor of the Lords; seing them so influenced and bowed from above, to go over a practise so clear as that in 1612 is, and whei of the principall decreit was produced, and over so much reason as was adduced from the unsecuring of the liedges. Sir Geo: L[ockhart] violented himselfe much in the affair, he never pleading chearfully ag<sup>t</sup> his oune judgement; when some of the Advocats ware asking him what could be said against so clear a principle as that defence of my Lord Weimes was, he faintly replied, The other opinion wanted not it's oune cullor. The Lords ran much divided in it, throw my Lord Chancellor's interest in Weymes, who, far and wyde complaines of the unjust measure he hes got from the Lords partiality or timoroufnes.

A. fol. 136,  
No. 349.

25 Junij 1672.—Umquhile Sir Robert Seaton of Windygaule having made ane excambion with his brother, the Earle of Winton, wheirby, in lieu of his lands, he got a heretable right in my Lord Dumfries his lands; to which sounes, Gairleton, as air, laying claime, compeirance was made for Sir Robert's sisters, who alledged, the said sounes behoved to belong to them who would be his executors in law, becaufe made moveable by Sir Ro<sup>t</sup> in his lifetyme, in so far as he required them and charged the debtors with horning, *quo facto animum declaravit*. Against which it was alledged, that the same aught to be repelled, in regard they offered them to prove that it was never his intention to transmit this soun to his executors by the said charge, seing, *esto*, he had got it, he intended, *simul et semel*, to have waired it on land; he was frequently hear[d] say, his Sisters should never have a penny of his means, yea, they themselves, in their ordinar discourses, boast that good providence hes

thrown that in their lap which their Brother never designed for them. That the bond charged on was but a bond of corroboration of a heritable security, and so, as ane accessory, *debet sequi naturam principalis*, and not turne moveable but by a requisition, which they cannot shew. Notwithstanding of all which pregnant qualifications of his *propositum et animus*, they found the soume, as moveable, to belong to the Sisters, who ware executors. This was judged hard; only Gairleton had the misfortune to be generally ill-loved, and the ladies found favour with my Lord Chancellor, who is ane ennemy to none of that sexe, if they be handsome. Then Gairleton offered to improve the executions of the charge of horning, hoping that it might be found that the messenger had not 2 witnesses with him at the tyme he gave it.

5<sup>th</sup> Julij 1672. The Earle of Calendar, as heritable shireff of Stirling-shire, pershues the Toune of Stirling for making payment to him of these customes, commonly called the Shiref-gloves, as also of a stag every day of the fair, conforme to his possession, at leift the use and wont of his authors, the Earles of Mar. Alledged, That no right was produced to prove the Earle was Shireff, or had right to the particulars acclaimed. Answered, They had produced his infestment of the Shireffship, which, tho it was generall and boor not the particulars he sought, yet he offered him to prove these ware immemoriall casualties of that office. Alledged, His infestment is null, proceeding upon a gift or signator of his Majesty's, the tyme of his captivity in the Ile of Wight, all which are since revoked and declared void. Answered, Whatever defect it had that way the same is purged, being ratified in Parl. in 1662. Replied, *Quod non est, id nequit ratificari*. Farder alledged, That Stirling is shireff within its selfe, and so never ouned the shire of the shire. Answered, The two shireffships are compatible; the shire of the shire is the far older of the two, and was in possession of the emoluments accruing to his office, and now acclaimed, before Stirling ware made shirefs within themselves: that the gift giuen to the Toune was *salvo jure antiquioris*. Alledged, That these 30 years bypast the Shireff of the shire hes used no deids of possession of what he now seiks; that the Toune all that tyme hes bein frie and in possession

A. fol. 147,  
No. 359.

of their oun privilege of shireffship; and theirfor, the action being possessory, the defendars are to be maintain'd in their possession and most have the benefit of a possessory judgement. Answered, Their's no immunity prescryved, except they say 40 years frie. It was likewayes alledged, That the Acts of Parl. discharges all shirefs from oppressing the liedges in fairs, vizt, acts 60 and 61 in anno 1456, act 33 in 1469, with many others: vide act 277, *post medium* in 1597, act 125, P[arl.] 1581. *Item*, that it's *res judicata* already betuixt the Toune and this pershuar's authors, in so far as they having bein pershued by the Earle of Mar for thir very customes, they ware after debate assoilzied theirfra. Answered, That *res judicata* being *exceptio impeditiva litis ingressus*, and so in effect a dilator; the same most be instantly verified by production of the said sentence *absolvitor*, else no respect ought to be had theirto. Vide D. 10 Julij 1623, Crounar of Arran *contra* L. of Skelmurly.

A. fol. 148,  
No. 366.

xj Julij 1672. Sir W<sup>m</sup> Fleeming, comissar of Glasgow, pershued a declarator against one Zair, his clerk, to heir and fie it found and declared, that by the instructions given to the Comisars in anno 1666, the profite of all summonds, sentences, transumps, registrations, confirmations of the seall and signet, and all other such benefit shall be divided thus, tuo part to the Comisars, and the 3<sup>d</sup> part to the clerk. The Lords declared conforme to the instructions: Which decision hes awakened the Comisars of Ed<sup>r</sup> to fly to and get the like; and they imagine it will be 1000 mks. a year in their wayes, because at present their clerk gets more then they get all.

A. fol. 156,  
No. 377.

December 1672. In the special declarator pershued by my Lord Lyon, as donator to the single and lifrent escheit of the deceift Lord Salton, ag<sup>t</sup> the Fewars of Balveny, for making payment to him, as donator forsaide, of fundry summes of money, contained in bonds granted by them to the said Lo. Salton, rebell; compeirance having bein made for Arthur Forbes, it was alledged the saids bonds could not fall under the late Lord Salton's escheit, because this gift and pershuit was only taken by my Lord Lyon to his brother-in-law, the Mr. of Salton's behoof: to the which Mr. of S[alton] the said sounes fought by the donator to be adjudged to him, do

properly belong, and not to the deceit Lord Salton, under whose escheit it's craved they may be declared to have fallen : in sua far as the said Mr. having acquired the right of the lordship of Balveiny from the Lairds of Blackhall and Kinminnity, in whose persones the same stood ; he, at the same time, did grant a backbond and reversion to the said Blackhall, wherein he declares, all he payed for his said right was alenarly 38,000 lb., and that the same should be redeimable from him upon the repayment of that sounge ; and declares, that seing most of the vassells of the lordship ware componing for confirmation of their fews, and for new rights, and from whom considerable sounes of money was expected, that he should, for his oune better securitie of payment, do exact diligence to transact with such of the vassells for new securities to be given them, who had not yet transacted, and to perfit the rights and confirmations of such as had transacted already, and from both should uplift their compositions in part of payment to him of the aforesaid sounge of 38,000 lb. of woodset ; and whatever he received upon that accompt, he obliges himselfe to deduct it from the said sounge of 38,000 lb., and imput it in payment theirow, *pro tanto* : To this backband and reversion Arthur Forbes having acquired right, is confident the Mr. is weill neir payed by his intromission with the said sounes payed to him by the vassells for rights ; and hath a compt and reckoning depending against him for that effect ; and which backbond the Master would in a most disingenuous manner altogether evacuat and render ineffe&uall, by this method and unhandsome contrivance,—that the Lyon takes a gift of the late Salton's escheat, tho truly to the Mr's oune behoof, and under that most unjust and unworthie conveyance, should enhance and absorb the said sounes payable by the vassells for their compositions, (and which ware destinat for his oune payment of the foresaid wodset sounge, and most of them so applied, and who hes sole and best right theirow,) under the late Lord Salton's escheit forsooth, that so the Mr. may still have power to clog and affect the saids land and lordship of Balveiny with the foresaid hail sounge of 38,000 lb., as tho none of it ware payed ; suffering, by collusion, the saids sounes to be abstracted and carried away by the donator, tho the sole benefit of all will returne ultimately to himselfe ; that so his wodset may stand entire, and may thereby

engrosse that wholle estate by his moyen and artifices, and dishonest trinquetings, to the utter ruine of the haill creditors of the late Lord Salton. [For the Arguments in this case, *vide* Brown's Suppl., vol. ii. p. 690.]

Fol. 158, l.  
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—Many mo excellent grounds in law ware insisted on, which may be seie in the Informations: But after great heat and many debates and hearings, and much moyen used by the Lyon and the Mr. of Salton, with which they thought to have opprest the poor gentleman, the Lords generously, as I think, resenting the insolent incroachment, and pittying the weaker party, they found, after mature deliberation upon all the wryts and testimonies produced, the bonds in question ware partly conditionall and partly for one and the same cause, vizt, for granting confirmations to the fewers of their fews, and that the bonds can have no effect nor belong to this donator till the condition be purified, and the cause performed; and therfor affoizies the defender from this present proces of declarator, but prejudice alwayes to this donator, upon performance and purifieing of the conditions of the bands, to pershue ane new action of declarator as accords. After which, the pershuars having made their addresse to the Advocat, who was then sick, and came not to the Session, he seimed to be extreemly flumbled at the decifion, and boasted, after the Zuyle vacance, he would come to the House and shew the Lords such invincible grounds for his Majesty's interest, (which he said was horridly wounded and misregarded theirby,) that would make the Lords, if not alter, at leist resume and demurre on what they had done. But he was not so good as his word, and came not abroad all that Session; but, to supply his absence, and to do some thing, he wrot a letter to the Lords to reconsider the cause, in regard his opinion was contrare to their Lordships, &c.: and which magisteriall way of dictating to the rest of the Lords, S. G. L[ockhart] hectours furiously in his Informations. But, whowever, the Lords complied so far with him as to allow them a new heiring: wheirin the pershuars insisted much to make it appear that the counter-oblidgements ware not correfpe&ive nor reall, and which is fully represented by us formerly; yet the Lords advised it of new and adhered to their former interloquitor. S. G. L[ockhart] in his last Information on this affair, was very bold and severe against the Advocat, with whom only he hath the vanity seriouffie to contend, looking upon him alone

as his equall, tho he thinks him mightly crazed and bruized by his winter's fever: In the end of it he tells the Lords, that *defultoria illa levitas* in fixing or altering interlocutors after full deliberation, ware most derogatory to and a prostitution of their honor and maj[esty]. The Lords would judge thir expreffions petulant and reflecting, and censure them in ordinary advocats; but they stand in some aw of him. The pershuars ware so much the more damped, that by their moyen they had flattered themselves a certain victory; and the Lords deportment was so much the more commendable, that they held justice so dear, wheir they had so great tentations to waver. *Vide* the decifion *supra*, at the 8 of Dec<sup>r</sup>. 1671, Mr. Arthur Gordon *cont.* L. of Drum.

7 Februarij 1673. *Francis Kinloch, John Johnston, and others, contra Sir Androw Ramsay, Lord Abbotshall, &c.*—[The Pleadings in this case <sup>A. fol. 166, in fine, No. 387.</sup> extend from the end of folio 166 to the close of folio 214. The Author, in a marginal note at the beginning, says, "Severall of the passages and arguments insert in this pleading, ware used by Sir John Cunyghame, others of them again, by Mr. Alexander Spotswood. *Nota*,—The one halfe of this pleading, yea the fourt part of it scarce, as it's heir, was nather fpok nor informed on, but is added for lustre and diversion."

The following is the arrangement of the pleadings; and the extracts given chiefly contain the facts of the case.

Sir G. M'Keinzie, *Prælocutor in perquite*, fol. 166 to end of fol. 173.

Sir G. Lockhart, *Prolocutor in defence*, fol. 174 to 183, b.

Reply by the Pursuers, . . . fol. 183 to 189.

11th Feb<sup>r</sup>, Duply by Sir G. Lockhart, fol. 189 to 201, b.

12th ,, Triply by the Pursuers, fol. 201 to 211.

Quadruply by the Defenders, fol. 211 to 214.

SIR GEORGE MACKENZIE, *Prælocutor in perquite*, having stated the privileges conferred on the Burgh of Edinburgh by several A<sup>c</sup>ts of Parliament, in regard to the election of Magistrates, insisted that it might be found and declared, That the Magistrates ought to be yearly changed, and that no persons of a higher rank than merchant should be capable to exercise the office of a Magistrate; and, consequently, that Sir Androw

Ramfay, Lord Abbotshall, being advanced to be a Senator of the College of Justice, and so of a higher quality and rank than a trafficking merchant, ought to be declared incapable to be elected in all time coming.<sup>1</sup> He then proceeds :—]

Fol. 169, l. 44. Thus have I confirmed the first ground of our present Declarator, vizt. that their ought to be ane annuall change of magistrats in royall borrows, and derived it from the pure streams of reason, policy, authority, civill law, and customes of foraine countries. There only remaines now the last branch of my undertaking, to condu& your Lordships thoughts to a short reflection on our oune municipall statute law and customes; sure it does not choak nor interfaire with a principle recommended by so much light and pregnancy of reason: No, we shall find a perfit harmonie betuixt them. Be pleased then to know, that our legislators of this kingdome, adverting that the priviledges given to the Burrows were invaded and prostitut, not only in Ed' but throw the rest of the kingdome, by the ambition and covetousnes of persones who

Fol. 169, b. affected superiority and command within brughs to the great hurt and decrease of trade, (which is the life and being of corporations,) did, from tyme to tyme, by severall laws and acts of parliament, vindicat the same, and provide remeid, by which the promotion of persons to Magistracy within brugh was appointed to be by the free suffrage and election of the people; and in regard that gave occasion to great contentions, tumults, and confusions, then it was ordered to be by the people's representatives in a senate or councell, and the continuance of the magistrats choicen was to be only for a year; as particularly by the 29 A&, Parl. 5, King James the 3<sup>d</sup>, *anno* 1469, it's exprefly provided, that na officers or councell be continued in burrows longer then one year; and by the 80 A&, Parl. 6, King James 4, *anno* 1503, it is statute, that all provefts and others having jurisdiction within brugh, shall be changed yearlie. Likeas, the magistrats and councell of Edenbrugh finding the many invasions and ineroachments the pride and ambition of some amongs them made upon thesse acts, so that the forsaide bars ware not able to containe them, they,

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<sup>1</sup> See a short note of this case (Gosford's Decisions,) in Brown's Supplement, vol. i. p. 682.



by their a&t, dated the 5<sup>t</sup> of O&tober 1658, and again, upon necessary grounds, renewed on the 28 of September 1660, did ordaine that no Proveft should continue longer then 2 years at most at one tyme. In which A&ts I find a pretty agriement with what I observed from the Roman law both as to the intervalls of repeiting offices and as to seclusion till compt, for heir they are appointed to be a full yeir out of all office ere they can be choicen and brought in again. Nixt the advancement of the Thesaurer to any other place is discharged, and he is declared incapable till such tyme as the compts of his intromission whille he was trefurer be fitted and approven by the Councell. And now notwithstanding by reason, policy, authority, the common law, by the laws and undoubted customes both of this and all other nations, elections of Magistrats within brughs are annuall, and cannot be continued for any longer tyme, as is clear from all the uncontroverted grounds adduced by me; yet Sir Androw Ramsay Lord Abbotshall, now present Proveft of Edinburgh, having *viis et modis* raised himfelfe from being youngest bailzie to be immediatly Proveft, hath thesse 10 years bygane so practised and influenced the elections, that he hes alwayes procured himfelfe to be continued and elected from tyme to tyme to be their Proveft, tho within the Toune of Ed<sup>r</sup> where there is no penurie, and are so many able to exerce the said employment, and tho his constant election was nottorly contrare to the knownen inclinations both of magistrats, councell, and people, a few only excepted, whom he had associated to himfelfe in the government. Yea, Sir Androw, to give the citizens a tast of what they ware to expect, immediatly after his 2<sup>d</sup> year's election of the 10, off goes the Laws and A&ts of Parliament anent annuall changes, off goes the A&ts of the Toune Councell; they are solemnly rescinded, they must not stand in his way: and after all this, when the burgeses of the brugh did rationally expect upon his late promotion to be a Senator of your Lordship's bench, he would have relinquished all thoughts of continueing in their Provestrie, yet contrare to their hopes, and his oune reiterat professions, he obtained himfelfe to be re-elected at Michaelmas last, 1672, whereupon the body and community of this ancient city, the old magistracie, many of the present magistracy, tho of his oune inbringing, and the Councell being appre-

Fol. 170. henfive that his interest, by their silence and acquiescence, might turne so fixed and rooted, that their fundamental priviledge of election might become ane fanfara and empty show, a complement and, *pro more*, a bare-skelet and carcase of a priviledge; and that this exemple might embolden others to attempt the prostitution of their freedom of elections and of all that is known to be the Toune's just rights; and considering the forsaide statutes have been made from tyme to tyme by our wise lawgivers, to correct and remeed such tyrannous invasions, and after all sober methods and applications used to the said Sir Androw proved ineffectuall, the Pershuars ware, much against their will, necessitat by this Declarator to implore the benefit of law, and that your Lordships may find their Magistracie ought to be annually changed, since they have found the fact smart of continuations in their heavy experience thesse years past, from which *tanquam ex equo Trojano*, or a fruitfull womb, have plentifully isshued furth that viperous brood of inconveniences we before deciphered. In a fat luxuriant soill that is not every year broke open by the sweating industry of the labouring man, and made *novale*, that is, as it ware, changed from on shape to another in a perpetuall vicissitude, what crop can be expected but a rank increase of weeds. I hope all will confesse that the government of magistrats within burrows (who are as the fathers of the people,) ought to be tender, calme, and moderat, to the end that every honest neihbour may freely propose and debate what may be for the advantage of the brugh, yet the long continuance of the said Sir Androw's Magistracy rendered him so proud and insupportable, swelled him to such insolence over the citizens as he could have used no other to his wassalls or slaves, that in his presiding in the Councell, he sometymes most captiously ensnared them, sometymes most tyrannously threatned and abused any of the members that displeased him, or offered calmly to debate, with most scandalous and opprobrious language, and by commanding them silence else he would lay their feet fast; as will appear from his carriage to bailzie David Boid, to deacon Robert Elliot, and to Francis Kinloch and others, (the particulars see in the summonds,) tho it be a clear and undoubted usurpation in any Provest to offer to imprison a citizen without previous triall and order from the Councell; and if that power of threatning and imprison-

ing were allowed to Provefts in fuch cafes, their fhould be no freedome in votes and debates, none durft fpeak to him or offer him counsell, (in their private difcourfings they faid he was fo proud, fo opiniatre of his oune fufficiency and elevation above all them, that he eftimated them all as fots to him, and, for his tyranny and cunning, they compared him to Oliver C[romwell], and that he was the fitteft to be a Sultan or the Cham of Tartary of any they knew,) or vote and debate againft him, honeft trading men being unwilling to be incarcerat or laid afide from going about their affairs: and yet this insolent overruling is no more but a naturall fruit and confequent of his continued Magiftracie: At his entrie he feemed fomewhat more zealous for the Toune, and about 8 years ago he made Sir William Tomfone leap out of his place for attempting that which himfelfe hath fince too frequentlie practifed: then the Toune cried him up, but it feemes he defigned only theirby to act uncontrolled without a rivall, and would not admit 2 Cæfars in the toun. Let us proceed to the reft—annual change keeps Magiftrats from trinqueting, knowing they will be fhortly called to ane accompt: continued Magiftrates begin to dream they are exempt from it, and adventure to difpofe more arbitrarily on the common good, and thinks they can fhun, at leift delay, their counting: By Sir Androw's continued Dictatorfhip, the poor good Toune hes felt this evill too: fince his entry to the office the Toune hes had 6 or 700,000 mks. for the fubje& of their liberality, Who durft ask a compt of this at Sir Androw during his governement? who then can deny the juftice, yea neceffity of a change: when a perfon defires to continue himfelfe in ane office againft the inclinations of a people, it gives ground to a very charitable jealoufie of hidden profit, *ægre amittitur quod valde amatur*, and all knows that a great bliffing hath fallen upon Sir Androw fince he came to the Proveftry. See more of this *infra*. A third mifcheiff of continued governement we marked, was fa&ions, grudges, feditions, difcontents amongs the people. Petronius Arbiter tells us, whair magiftracy is continued all confpire on againft another, and heir *habemus reum confitentem*, we can judge him *ex ore proprio*, he accused and impannelled the Toune of a tumultuary convocation. It's true the whole ftory was of his oune forging, but he wanted the brazen wall, *nil confcire fibi*; he

Vide [page  
3,] 20 Feb.  
1665.

Fol. 170, b.

knew he had given cause and provocations, and with't the Tounne so much good as to have them falling in the *premunire*. I fear it will be needles for me to propose the heroick and eminent exemples of Codrus and the Roman knight Curtius sacrificing themselves for the preservation of their countries, they will not be followed in their gallantrie; but this I will say, —as the Athenian monarchie found ane end in Codrus, so if Sir Androw will imitat his generous example, and quit his picks and sacrifice his privat interests to the publi& good of this Tounne, their monarchie and his majestie will soon come to ane end, and they will do him the same right the Athenians did to Codrus, he shall be the last king that shall rule them 10 years together, as having none fit to succeed him in that point. (See this subje& prettily enlarged infra, in fol. 185, l. 44. See Petavius's Accompt of Tymes, pag. 36; Heylin, lib. 2 of his Geographie, pag. 190.) The divisions and animosities of Sir Androw's overhaling hes raifed are more vifible then to be refused, but they have burst out in no illegal eruptions, unles you call this Declarator such, which cannot in any justice be so construed. A fourth bad effect we observed to attend perpetuating in Magistracy, was the filling of all offices and places ather of trust or profit with their ounne freinds and relations, and that the Tounne groans under this, can convincingly be demonstrat,—their being none preferred within the said brugh to any employments, and kept in them beyond the tyme allowed, but Sir Androw's ounne servants, relations, or flatterers: contrare to the practise of good Nehemiah, chapter 5, verses 14 and 15, he would not so much as eat the bread of the governor, much lesse make his servants bear rule over the people: But this is not all my clients misery yet;—for albeit the Clerk of the Toun be a person who should only be choicen for his great abilities and knowen affection to the Toun and experience in their affairs, and *ubi industria personæ maxime requiritur*; yet the said Sir Androw did prevail with the Tounne Councell to employ his ounne son to be their clerk, whille he was yet a meer child, and that he nather could serve them, nor could they know what might be his integrity or abilities: in the mean while Sir Androw lifted the profit annexed.

Toune's *edictum perpetuum* forsaide, Sir Androw Ramfay continues to exercise the office of Provostrie within the brugh of Ed<sup>r</sup>, albeit he nather be ane actuell traffiquing merchant for many years past, nor be of the rank and degree of merchant, he being advanced by his Majestie's warme favor to the eminent and illustrious dignity of a Senator of the Colledge of Justice, and theirby become of a hyer degree then a merchand.

How can it then with any measure of ingenuity be affirmed, that Sir Androw Ramfay can conscientiously discharge the office of Provost of Edinburgh, who is a Senator of the Colledge of Justice, a Member of the Privy Councill, Exchequer, Plantation of Kirks, and hes 3 opulent fortunes to manage, lying in 3 different shires from this of Mid Louthian.<sup>(1)</sup>

He who will not or cannot attend us, most not be our Provost; the citizens of old ware so zealous of this, thay ware speaking of depriving Sir William Nisbet from the Provostrie, only for residing sometymes in the vacance at the Dean, and others have been quarrelled on that fingle score. And now I hope the plurality, incompatibility, and inconsistency of the many offices posselt by Sir Androw, by which he is opprest and the places starved, which makes our 3<sup>d</sup> reason of declarator, is sufficiently cleared. [The author here remarks, that their was a fourth and fifth reason of Declarator added in the summons, but he says] I have made the fifth a branch and qualification of the forsaide 2<sup>d</sup> ground; and it concerned Sir Androw's proud, insolent, and insupportable government over the citizens, as if they had been his slaves. The fourth reason was a speciall reason of reduction against Sir Androw's election at Michaelmas 1672, viz<sup>t</sup> that he was not lawfull Provost, not being elected by plurality of voices, in so far as bailzie John Lauder, who was on the lite with him, had 17 votes, and Sir Androw had only 16; for albeit it

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<sup>(1)</sup> See my *compend* of Naphtali; and the Scots Greevances under Lauderdale's administration Fol. 172, complain of the suppression and accumulation of great places of trust and profit in the persons foot of the of one man. The first names Rothes, and the 2<sup>d</sup> that vain empty man, the Earle of Atholl, as it calls him.

Fol. 173, b. was pretended that bailzie David Boyd's suffrage was to Sir Androw Ramfay, yet the truth is, it was qualified and conditionall in thir termes,—  
 “If he can be elected by the laws and acts of Parliament;” and he, having considered the case, and at last being cleared in his owne mind that he was incapable of thesse laws, he did clear and purify the condition of his vote the first councell day thereafter; in respect whereof, the said Sir Androw was not elected by plurality of votes, but John Lauder was lawfull Provest. But at the debate they offered not to insist on this reason, knowing it was both irrelevant and odious, and that they expected not the Lords so propitious as to gratify them by annulling that bypast election, roborat with possession, and whereof the halfe of the year was neir expired; and they ware so wise as only to insist for Declarator to take effect in time coming, of the annuall duration of their magistrats, and that they be of the rank and quality of actual trafficquing merchands, and consequently to declare the incapacity of Sir Androw Ramfay's being hereafter choicen their Provest, as falling under the hail prohibitions above mentioned. But the said fourth reason, about the plurality of votes, may easily be answered; 1<sup>o</sup>, It's against all sense or reason to allow the retracting or explaining of votes *ex intervallo*; no election ware sure at that rate; 2<sup>do</sup>, The Canon law has an excellent exposition for such dubious votes, *Vota conditionalia* (sayes Pope Innocent the Fourth *in capit: 2<sup>do</sup>, de electione et electi potestate in 6<sup>to</sup> Decretalium*) *alternativa et incerta in electionibus vel causarum decisionibus reprobantur, pro non adjectis habentur et in pure consentientes recidunt*: which clearly decides the plea in hand.

Hitherto my Lord you have heard what the good Toun craves your justice may declare; it's that you may restore this City to its ancient liberty, curb and restraints the ambitious designs of those who have endeavored and still endeavor to appropriate the government of it to themselves; animate and revive the spirits of the deserving and drooping citizens, hitherto most unjustly debarred from the exercise of what they are most capable of; crush all the latent and selfe enriching projects which have been hatched and fomented within their bowells, by their owne ignorance and inadvertence thesse many years bypast; what they crave is, that their Magistrats may be annually changed in all tyme coming, and that

no person hereafter be choicen one of their magistrats, save he who is an actual trafficking merchant, of no higher degree and quality than other merchants, and who can and will constantly attend the employment of Provostrie or other magistracy within their burgh; they crave that the law applyed from your mouth may put an end to their oppression and tyranny from a decennial dictatorship, which ambition and vanity will not; their action is a Declarator the most just, the most involuntary, and so most necessary, the most relevant and best founded of any ever was insisted in before your Lordships; it's the breath and the pulse of the whole City; we have both merchants and trades for persuaders, both magistrats, councillors, and people are for it. Why should Sir Andrew stand alone? And tho we have called the present magistrats as defenders in that, it's but like to a *cognitionis causa*; it's *pro more* only; it's their interest as well as ours to have their birthright privileges and freedoms so clearly given us by law declared vindicated cleared, to have it found we are not slaves but free borne citizens; from your Lordships we expect the extract of this our birth breiff; and so I shall conclude as I began, If I know any honest inhabitant a real enemy to this Declarator, I should instantly quit my party and appear for my Lord Abbotshall.

(Besydes the conclusions of Declarator aforesaid, there was also a conclusion of reduction and nullity of Sir Andrew's last election at Michaelmas 1672, insert in the summons, viz. that the said Sir Andrew's election was null, as not created by plurality of votes, and that either bailie Lauder was elected by plurality of voices, and so ought to exercise the place and office of Provost for this ensuing year; or else that the said Sir Andrew being found incapable to have been elected for the reasons mentioned, the election is null, and the power is again in the hands of the remanent magistrats and council. But they past from the reduction, and scarce once mentioned it in the debate, for the causes I gave in the other page.) Fol. 174.

SIR GEORGE LOCKHART Prolocutor in defence.

To this it was answered by the proctors of the Magistrats of Edinburgh, defenders in this action, in name and behalfe of themselves, and the good Towne whom they represented; that the Declarator insisted on so great a Fol. 174, l. 13.

transport of popular licence, so high and dangerous an innovation, as by no precedent ather in this or any other nation was the like ever attempted, much lesse sustained. This disperat, scandalous, and infamous Declarator ware only pertinent for a John of Leyden, a Knipperdoling, a Masaniello, a enraged Venner the cooper, and his Fyft-Monarchy men, (see it in Baker's Chronicle *anno* 1660 :) nothing but complicated dulnes and unpardonable mistakes of law, and an extravagant and unparalleled impertinence and blinded malice could ever have brought furth so flegmatick and insipid a Declarator,—the most groundles, foolish, and irrelevant of any that ever had confidence to apply to your Lordships bar since your institution. The yeelding to so mad demands as this Declarator craves, ware to throw us all again unto confusion, rebellion, and anarchie; this shakes the crowns of monarchs, if they durst, they would desire them to be annuall too; this breaks up all societies, dissolves the pins of government, and threatens to reduce the world to a 2<sup>d</sup> Babel, if not to the first Chaos: but whither will not popular licence hurry men? My Lord Chancellor, the scripture tells us God Almighty hath sett bounds to the ocean, and said, Hitherto shall thy proud waves come, and no farder, Job xxxviii. verse 10 and 11. By his perpetuall decree they may weell tosse themselves, prevaill they cannot, roar they may, passe over they shall not, Jeremy v. verse 22. *Loccenius de Jure Maritimo*, pag. 30. Your Lordships will doe weell in imitation of the Divinity, to set limits to this inundation of the wild multitude; if you suffer them once to make this breach in the bastion of magistracie, which they now seek to undermine, they shall overflow all banks, invade and seize on all that ever was known to be the just rights of magistracy; you shall not be able to hem in their prosperous insolence, nor will they obey you when you say, Hitherto shall your contradi&tion against your magistrats come and no farder. (See my Lord Lucas his speach in the House of peers *anno* 1670.) I pray you let us be serious in so important an affair. I appeall to the experience of all ages, to all who knows the trite maxims of policy, if this be not a certain and confirmed truth, that concessions does never satisfy or mitigat, but ever heighten, raise, and embolden popular licence; and theirfor your Lordships would resist the first beginnings and appearances of so hy



ane innovation; deny the first desires of a multitude while they are yet more modest, by ceding and gratification, you'll but ferment their giddy extravagance, and then you must not think to get them refused afterwards, for ather they'll extort it, or, at cheapest, you cancell and losse all the courtseyes and obligations you formerly did them; you may as weell quench a thirsty hydropick as satisfy them; they are never or feldome to be found on that fyde wheir reason is. Our late troubles in all its progressive steps is ane sad but ane undeniable evidence of the truth of this position. It will be worth our paines to enter into ane inquiry from whence all this dust and extraordinary clamor is raised against my Lord Abbotshall, and from what commencements this sneaking Declarator has sprung, and, upon examination, I find the following ingredients therein, viz<sup>t</sup>. inconstancy, ingratitude, envy, emulation, insolence, wantonneffe, hatred at vertue, the comon rewards by which all communities have ever been in use to remunerat their best and worthiest magistrats, especially if they ware vertuous and of ane eminent reach above their elevation. The 2<sup>d</sup> is their pride, vanity, and ambition, by which they are spurred incessantly to grasp at the government themselves. And their is a 3<sup>d</sup> specialty heir that gave life and being to this infamous pershuit, and that was to compence and palliat their caballings, factions, brybings, and other seditious and tumultuary practises carried on by thir pershuars at this last election, and wheirupon they are endyted. . . . .

Fol. 174, b.  
See the incomparable  
Εκων Βασ-  
λινη, cap. 6,  
p. 40.

Hitherto we have discoursed largely of the generall and more remote causes productive of this turbulent Declarator of the people against their Magistrats, viz. their naturall instability, jealousy, ingratitude to them who deserves best at their hands, envy, vanity, and ambition to rule; their remains another cause which I mentioned having a more immediat and speciall influence in hatching and fomenting this viperous proces, and that was, theirby to palliat the seditious and tumultuary practice, [which] malice and ambition had driven thir pershuars headlong upon in the last election at Michaelmas 1672; for having designed *per fas aut nefas* to enhance the government of the Toune, in their oune hands, and knowing that vertue and merit ware things so difficult, and wheirin they

Fol. 177, l.  
49.

Fol. 177, b. had no interest, so that they could not expect to compete and rise by such, they call in detraction, lying, calumnies, drinking, bribing, threatening, cajolling of simple tradesmen, as the best and speediest auxiliaries the damned abominable principles of this age affords, and yet oftymes effectually works their point. My Lord Abbotshall's great merit most be cryed downe, most be murdered, for it stands in their way. A protestation is drawn up, before the late election, in most dangerous and seditious termes, tending to amuse and stir up the inhabitants of the Town as if all their priviledges were to be utterly subverted and annulled if Sir Androw were elected Provest, and that innumerable sad and destructive consequences would follow thereon, and their names would stink with posterity as infamous and perjured; that it would open a door to let in the ruine of all their liberties, which had been maintained by their predecessors with great zeall, faithfulness, and wrestling; that they would break the laws in choosing him, &c. Hundred copies of this were dispersed to poison the people; bribes were offered for votes, and who refused were menaced; false charges of horning were coyned and given the ignorant deacons, discharging them, under the paine of rebellion, to give their vote to Sir Androw. Many false and villanous insinuations they made of his pretended malversation in the Townes affairs and common good. After he was choicen, maugre all this unwarrantable and factious caballing against him, they will not fist their, but reinforces their fury by their disappointment, and causes one Deacon Elliot give in next councell day a frivolous protest against the legality of his election, and had some of the rable of the town convocat to back it in vast numbers at the councell-house doors in a most seditious and tumultuary manner, and who insolently boasted that they would De Witt Sir Androw if he did not dimit his place, and were ready to rescue Elliot in case he had been sent, according to his deservings, by the councell for his faction to the Tolbuith. Of all which disorderly and irregular courses their pershuars having been the contrivers, authors, and sole abettors, and being procest thereupon by his Majesties speciall command before his Privy Councell, and the same very prægantly proven against them, and which lyes before his Majestie to be advised by him; they, from their conscioufnes of all that guilt have raised this scan-

dalous, infamous, and tumultuary Declarator, to exculpate and palliat their forsaidd factious and intollerable designs and practises.<sup>1</sup> . . . .

And thus, my Lords, have I traced and derived the pedigree of this monstrous, unnaturall, and tumultuary Declarator, both from its remoter and from its more immediate muddy sources. I shall now, with your Lordships favour, proceed to descant upon this desperat, scandalous, and infamous libell it selfe, which belyes not the kind it's come of, but hes all the lineaments that contribut to a similitude betueen such ane efficient and such ane effect. Their needs no more be said of it to make it's proper qualities be knowen, save what Appelles once wrot at the foot of a portrait, made ridiculously deformed by every ones dash of amendment, —*Hanc populus fecit*. And, to begin with that false insinuation by which the pershuars proctours ushered in their cause, as if all the City and all its inhabitants ware for this pershuit; the best ansuer I can make to it is tuo acts I here produce before your Lordships, wheirby the present magistracy and councell, and the deacons of the fundry incorporations of the trades of this place, doe absolutly disclame and disoune this Declarator, as ane innovation endangering all their priviledges; the one is past in the Toune Councell as the only representatives of the brugh, the other is ane Act of the Magdalen Chappell made by the plurality of the deacons;—this is a shreud prognostick of what your Lordships may expect from thir persons, whosse very first representation studies to impose upon you, *ex pede Herculem, ex ungue Leonem*. . . . .

. . . A stranger hearing all this buuffle and clamor raised by thir pershuars, may be justly struck with admiration what it can mean. The naturall idea and apprehension that will come in their heads at the sieng so much dust raised, is,—sure he most be some monfter this man, that provocks them to cry, as the Jews did against Paull, Acts 21, verse 36, Away with him, away with him,—he most have robbed temples,

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<sup>1</sup> See the protestations abovementioned, both Elliot's and Francy Kinloch's, and the 12 articles containing the rise and progresse of their tumultuary practises and convocation about the last election; *item*, the state of the probation theirow all besyde me; and sie their most virulent and crafty speech they dispersed abroad, (tho it was not till before the election 1673,) called The Speech without Doors, filled with threatenings if they continue Abbotshall; its worth the reading.

violat virgins, committed sacriledge, done them the hyeft difobligations imaginable, been unfaithfull both to God and men; one would juſtly expect all this and more behooved to have occaſioned ſuch ane hubbub and uproar. Come, I'll be complaiſant to thir gentlemen, and I'll examine what are my Lord Abbotſhall's eſcapes, and, after a full deliberation, I find, if he has exceeded, it hath been in zeall for this toun, to which he hath done ſuch ſervices as oblidges them, by all the rules of gratitude, to thank and defend him eternally; but I have ſhown that he who ſhall aſt moſt for their good needs expect to be moſt loaded and exclaimed againſt for his comfortable reward, and I ſhall only remember you that *cauſa infirma* is *ſemper quæſula*, and moſt be ſupplied with railings and calumnies,—where the lyon's ſkin fails, it moſt be eiked out by the foxe's taill. I ſhall not offer any panegyrick of my Lord Abbotſhall's abilities, integrity, and merit,—it's much eaſier to detract than praiſe, man's nature bends more to the on than to the other. Flattery I cannot be guilty of in this particular, being furniſh't from ſo large a ſtorehouſe of vertuous actions, that appoſit words ſuitable to expreſſe the grandeur of the theme may be much ſooner wanting then ſubject matter, and many judges it more ſafe to paſſe over a noble untainted reputation in ſilence, then by mean representations ſinking below its worth, to fully and wrong it. *Præſtat de Carthagine, &c.* And, tho his modeſty will bluſh at the rehearſall, yet I will indulge ſo much to thir perſhuars as to reſreſch their memories with a few of the many good offices done to them by him whom they now ſeek to wound in this Declarator.

Fol. 182, b. I ſhall not run back ſo far as to his moſt prudent and moderat government the tyme of his firſt Proveſtry from 1655 till 1658, I ſhall reſtri& my ſelfe to his re-entry theirto in 1662. Your Lordſhips, then, will be pleaſed to know that he then found this Toun miſerably divided 'twixt 2 ſtrong fa&ions, the Merchands and the Trades; the combuſtion was ſo great it ſeemed almoſt inextinguifhable: they had, with much bitterneſs [and] animofity ſtaged one another before the Parliament about mutuall invaſions on priviledges, they had drained one another's theſaurie, and all were afraid of the conſequences of ſuch alienation in the minds of the neihbours. Sir Androw not only, beyond all expectation, compoſed their differences,

but also, like a common father to both, hath kept them in an æquable ballance and temper ever since. At his entry, the Toune's credit was so low, that creditors lookt upon the debts they had in their hands as halfe desperat, and all of them ware redeeming their stocks with the offer of abatement of 6 or 7 years annuel rents; wheiras he, by his carefull management and oversight, so revived the Toune's credit and reputation, that they are at present reput the best debtors in the kingdome, and are courted on all hands by such as would secure their money. He hath caused pay fyve hundred thousand merks of principall summes since his entry, besyde the punctuall payment of annuells. He it is that by his favor and sagacity hes procured their stock and common good to be augmented fyfty thousand merks by year beyond what ever it was formerly. When he entred to that office, he found forty-fyve thousand merks of arrears of bygane stipends owing to the Ministers of the toune who ware turned of upon the change of the Church government, and in former tymes they could never reach to what compleited their Ministers [stipends], but yeirly their was a considerable deficiency, for which the Toune behooved to be stented; and yet he caused pay that 45,000 merks of arrears, and hes so ordered the Ministers salaries since, that at this day their is not a 6 pence owing to any of them; albeit the Toune had then the rents of the Bischopricks of Orkney fermed at 10 or 11,000 merks *per annum*, as an additionall help to their payment, and whei of they now stand deprived. Did not he interfaire with the gentlemen and heritors of the shire of Mid-Lothian in getting the proportion of the excise rightly adjusted, by which means he procured 10,000 merks by year casten upon the shire, and the Toune freed of that inæqual burden under which they ware formerly groaning? Did he not contend with your Lordships of the bench anent the præcedency and grandeur of the provest of Edinburgh, and did not his zeall in promoting thesse publi& concernes draw him under the odium and hatred he suffered? Did not he get 200 lb. English money annexed to the office of provestry, payable out of his Majesties Exchequer? Did he not obtain, in the Convention, a revaluation and alteration of the Taxt roll of the Burrows, which had been attempted by sundry provests before him, but never could be got effectuat by any but by him?—which proved

Fol. 183.

Fol. 183,  
l. 23.

so great an ease to this City of their old proportion, that in the taxation imposed in the last session of Parliament, in 1672, it will be 300 lb. sterling of ease effectually, the same being translated and parcelled to Glasgow and sundrie other burrows, who, considering their present wealth and trade, were undervalued; they, sure, would owe him no kindness for this action;—and all this befalls him in wrestling for their sakes. Did he not, in imitation of the City of London, procure Edinburgh declared free of all locall quarterings of sojors? Whow many particulars are their, in which, beyond all rationall contradiction, or a peradventure, this Towne would have suffered, both in its honor, profit, and priviledges, had not his vigilant and prudent eye waired the blow? And is this all the reward they would give him for so many honorable and laborious services he has done them:—sure this surfeit comes from overmuch plenty, and from an insensible happiness (as I derived it before.) What are they who are his pershuars? Are they not men whom he himselfe hath raised and preferred to the Magistracy, and other places of trust, even from contempt and obscurity? And in this I shall confesse he erred, and seemes, in a just retribution, to be recompenced by this viperean brood; but may he not retort on them, as he in the comedy does,—*Licet ego dignus essem contumelia, tu indignus qui ut facias tamen*: Plautus.<sup>1</sup> But he has a more generous principle actuating him, viz<sup>t</sup>, that *Bona facere et mala pati regium est*. What are thir pershuars and their adherents? Doe not sundry of them stand openly convi&t of bribery and other vile and disingenuous practises, and the common good of the good town was to have payed for all, as is clear from the depositions of sundry famous witnesses; a clear and palpable demonstration that thir men intended nothing but to convert and prostitute the government to their owne private ends and advantages. Since, then, this desperat Declarator is but an act of popular licence and sedition, is scandalous and of so bad exemple, tending to the contempt of all magistracy, I hope your Lordships will not encourage it, seing the government of this brugh is of a publi&t concernement to his Majest-

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<sup>1</sup> [There is no such passage, nor any similar one, in PLAUTUS. It is probably from TERENCE. *Eun. V. ii., v. 26. Etsi ego digna hac contumelia sum maxime at tu indignus qui faceres tamen.*]

ties interest, and wherein he is represented, then if any invasion be made on the people's privileges in the exercise of the government, complaint ought to be made to his Majesty thereof, who may take inquisition therein, and, as he finds cause, punish the offenders; otherways the magistracy of burghs shall be laid open to contempt of private factious persons, which, in reason of state, ought to be obviated, lest a door be opened to licentious persons to quarrell these who are in publick places and authority, as has been unanswerably demonstrated already. We agree the liberties of the good town be inviolably preserved, but it's manifest what is now sought is ane totall subversion thereof. In respect of all which, the persuuars having no interest, the defenders ought to be foil'd from this scandalous, groundles, and infamous Declarator. . . . .

Remember, my Lords, what fatal and dangerous effects changes have produced, and that it's now in your power to prevent them by preserving the true and ancient liberties of this burgh, whereof all sober and virtuous persons, minding the publick good, will alwayes remaine the zealous maintainers and assertors. But, in pity to humane frailty, doe not feed thir men's melancholy with chimericall privileges, with hopes position to the sun, fancying things beyond the moon, and bringing great booties from East to West upon the wings of their crack't imaginations; fill not their bellies with the east wind (as the prophet speaks,) with the hopes of an alchymist with thine empty smoak, with a declarator of a fancy. You know who pronounced *fumi venditor fumo pereat*; (it was the Emperor Severus against Vetronius Turinus.) See *Ærodius Pandect: in vetere editione Titulo de extraordinarijs criminibus, cap. 37.* Fol. 183, l. 55.

To all this it was REPLIED by the persuuars proctors above mentioned, in manner following:—

MY LORD CHANCELLOR. You have heard my clients rudely hector'd, suitable to the genius of the party they have to deal with, by his advocats, but they, with all sobriety, apply to your Lordships for assistance. We have, indeed, said, We will not have my Lord Abbotshall to reigne over us,—but we humbly conceive their's no faction or sedition in our resolve. . . . We know him, without flattery, to be of parts and integrity beyond most of the number of the citizens, and worthy of all the honor

put upon him, but, as Livy has it of Manlius, he is *vir (nisi in libera civitate natus) incomparabilis*. . . . .

Fol. 184, b.  
l. 11.

And really he [Sir Androw] ought to be the principall craver of this juft Declarator, especially feing their are few or none within this city but all are for it, both Magiftrats, Councillors, and people; and wheiras we ware in ane infolent manner represented as the dregs and lees of the Toune,—that pittifull miftake of our condition is to be pittied,—and may with fobernes enough be called a ly; for we have ane old Proveft on our fyde, (Sir John Smith being the only old Proveft alive in the city, except Sir James Stuart who was declared uncapable,) we have 20 Bailzies, 50 Deacons, all the people who bear the burden, and alfo 2 of the prefent Bailzies, fo we are nather the offcourings, nor altogether deftitute and difcountenanced by the authority of the prefent eftablifhed Magiftracy. We crave no innovation, but only beg of your Lordships the prefervation of the liberties the bounty of our Princes have given us. Having tempered our Declarator fo that it might only regulat *tractum temporis futuri*, we did not expect the leift oppofition to it. And it ftruck us with aftonifhment and admiration to find my Lord Abbotfhall, by his prefence, fo far concerne himfelfe, as to contradickt fo juft and moderat demands. If we had taken him by furprize and at unawars, fomething might be faid againft our method, but we gave him fair advertifement and great elogies, and never proveft might have parted with more love and affection had he griped at the criticall hower, and he might have been longed after again. Then the great part, both in the Councell and the Toune, ware his freinds, but discovering his pofitive defigne of continuing and perpetuating himfelfe in office, it awakened their more ferious meditations, and his wilfull defpifing of all fofter and pleafanter methods forced them upon this feverer way to reclame him; for he is fo bold, he takes councill of none of whom he ought, but relyes abfolutely to his oune judgement.

Fol. 188, b.  
l. 65.

And whille Sir Androw feemed to lend his ear to ane accommodation was their not ane Act drawn up by Sir George Lockhart and myfelfe, (Sir John Cunynghame?) in fubftance the very fame with our prefent



Declarator, and empowering every burgesse to look to the preservation of it, and pershve the breach, and making the transgressors punishable as Fol. 189. infamous, perjured, &c. But Sir Androw was serious about some other thing, he put it up in his pocket and we never saw it since.

It cannot be denied but the pershuars have ane interest in the liberties and priviledges of this brugh, and if so, then they most advert (if they will be faithfull) to the observance theirow, and make use of such innocent remedies as to pershve a declarator theirow before your Lordships, as the only Judges competent. As the priviledge and interest belongs to them, so does the application; ther is *in omnibus par ratio*. Seing, theirfor, by not sustaining our interest the interest of this brugh will, by consequence, goe to ruine, and that they are ill founded in law who would stave all off by such a dilator, your Lordships ought to repell it in respect of the Reply, and find that every man who hath a burges ticket hath sufficient interest to pershve this just and relevant declarator. But we are nowayes straitned in respect of them who insist in it; for we have the concurrence of the haill old Magistracy, of 2 of the present Bailzies,<sup>1</sup> (John Hall and Robert Leirmont,) of the body of the toun craving to have their priviledges cleared in respect of the differences occurred at the last election. And we know *ex L. 176, D. de Regulis juris, non est singulis concedendum quod per magistratum et judicem publice fieri potest ne occasio fit majoris tumultus faciendi vel dissensionis*.

To this it was DUPLIED by the defenders proctours (*viz*<sup>d</sup>, S. G. Lockhart) 11 Februarij, thus:—My Lord Chancellor,—Yesterday we heard a great many fancies 1673, *partibus ut supra*. about the point of interest, but so wild and louse when I gript them they vanish't, when I thought I had them fast: at the opening of my hand it was gone *in fumo*, like the hopes of ane alchymist, &c.

I shall only point at 2 things to your Lordships: 1<sup>o</sup>, Will not this Fol. 195, l. 1. frivolous pretence of being insolent and intolerable and of difficult acces,

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<sup>1</sup> Sir G. Lockhart called the dividing of the Magistrats in this juncto a schisme, a pope, and antipope. The truth is they never joyned with the pershuars but aimed at a neutrality.

ather in converse or in drawing them to an accompt of their aſtings, militat much more ſtronglie againſt all other offices and places of judicator in the kingdome? Doe not offices, ather heretable or given *ad vitam*, lay much more expoſed and obnoxious to this exception then the proveſtrie, which the Towne gets in their reverence once a year?—ſure they are 20 ſtages more liable. Then advert what thir men dryves at, and what are the importances and conſequences of relaxing people, tho never ſo litle, from the reins of ſubjection and government; their nixt attempt will be to ſlip of the yoke and break all bonds aſunder. But, 2<sup>d</sup>, the argument *in hypotheſi* is both falſe and calumnious, it being nottor that the proveſt nather collectſ nor keeps, nor ever had meddling with, the Towne's caſh, but hath the naked office of ſuperviſing whow it's expended, as will appear from the perufall of the Threſurer's comptes; and if their ware any thing in that, (as their is not the leaſt farthing,) he is knowen to be a perſon both eaſily conveyable and reſponſall for any thing they can charge him with, and I, as his champion, do now, at his deſire and in his name, throw doune the gantlet for the 3<sup>d</sup> tyme, and challanges and defies them all (under the paine and certification of being repute knaves, ſchellams, and willains, poiſoners and abuſers of the ſilly people, if they accept it not,) heir to tell, declare, and produce what they could charge him with of malverſation or extravagancy, if he ware out of office. And if they perſiſt in theſſe wretched and ſhameles cheats, and groſſe unpalliable leaſings, wheirby to amuſe the credulity of the populace after ſo pate a diſcovery, with ſuch brazen brows, will be indeed a palpable affront both to the underſtanding and ingenuity of mankind. But in this the defender will ſolace himſelfe, that it will nullify their credit with all conſidering men, and to their brazen brow hee'l oppoſe a brazen wall of innocent integrity. And as for the falſities they amaffe to ſtain his deportment as unbecoming a magiſtrat, I could not have ſuppoſed it poſſible that mankind could have emproved to ſuch a height of confidence, or that any in that ſhape could fall ſo deſperately from all ſence of conſcience and modeſty as to propagat ſuch lyes. And heir again he appeals them all, (and in this he hes perſones beyond all exception for his conteſtes and compurgators, *viz*, the ſeverall members of the Towne Coun-

cell,) if ever, during the wholle tyme of his bearing office, he used any opprobrious, misbecoming, or ungentlemanny language, to the magistrats or meanest of the Councell.

Who can rationally suppose it [the A& 1609] was ever intended to se-<sup>Fol. 197, l. 39.</sup> clude, incapacitat, or debar a borne citizen who served his apprentifhip, and was bred a merchand, and used trading of a long tyme, and, having a competency, quites it,—*esto*, such a man, by his oune merit and his Majesties favor, should be superveniently exalted to a hyer degree or dignity. . . .

This pretence of my Lord Abbotshall's not being ane actuall trader,<sup>Fol. 198, b. l. 7.</sup> can no more be obtruded against him at this day than it might have been thesse 20 yeirs bygaine.

But 3<sup>th</sup>. that which settis it beyond all limits of rationall contradiction<sup>Fol. 200, b. l. 22.</sup> is, that persones of a hyer degree than merchands, yea Senators of the Colledge of Justice, and Officers of State, have been elected to, and excercised the office of Provestrie within this city, both of old and of late tymes, both before and since their great Decreet Arbitrall; so that custome, that infallible interpreter of laws, affirmes their is no repugnancy, inconsistency, or incompatibility, (as is foolishly dreamed,) betuen thesse different offices; it hes showen us the possibility of enjoying both, by giving us many instances of one person actually excercising both places at one tyme: And not to run far back, we have *anno* 1558, and again 1561, Mr. Thomas M'cailzean of Cliftonhall, ane advocat and Tounes assessor, and afterwards a Senator of the Colledge of Justice, Provest of Edinburgh; and in the 1 A& Parl. 1563 this M'kailzean is commissioner for Ed<sup>r</sup>; and in 1557, when the Lord Seton, Provest of Ed<sup>r</sup> was sent to France, the councell choiced Sir Richard Maitland of Lethington, a Lord of the Session, for their Provest in his absence; then in 1570, Mr. James M'Gill of Rankeillor, Clerk of Register, and a Lord of Session, is choicen Provest of Ed<sup>r</sup>; then before all thesse we have 3 of the persones contained in the first erection and institution of the Colledge of Justice, viz. Mr. Adam Otterburne, Mr. Francis Bothwell, and Mr. James Lawton, who ware all elected, and did officiat in the capacity of Provests of Ed<sup>r</sup>; we have also Sir William Hamilton of Sanquhair-Hamilton, a Lord of Session and Provest of Ed<sup>r</sup>, as he is designed in the Lords books of

federunt *anno* 1554, and theirabouts, and particularly on the 12 of July 1554: We heard already how Alex<sup>r</sup> Lord Fyvie was Provest from 1598, to 1608, and yet all that tyme a Lord of the Session; then succeeded to him Sir John Arnot in the Provestry, who was Thefurer depute; all which appears from the records and books of the Toune Councell of Edinburgh, (see a litle extra& from them *apud* me;) and in the memory of many yet on life, was not Sir John Hay, in 1636, both Clerk Register and a Lord of the Session, and Provest of Edinburgh, which dispells that incomprehensible notion of incompatibilitie betuen the two offices. . . . .

Fol. 201, *ult.* And thus having diffipat the grounds of this desperat Declarator in all its parts and consequents, allow me to depositat with you, for a while, the duty of a barrister, and speak a little by way of advice and information to your Lordships capacity, as if I ware of your number. . . . . Encouradge not the canaille; if you doe, rest assured, they'le not stop heir. What if a Declarator should be raised against you, as the subverters of the laws of the kingdome; we showed it might be both more palliably and plaufibly done than this infamous Declarator you are now made judges of. Vindicat yourselfes and your posterity, and doe not prostitute the innocent representatives of his Majestie to the humors of the brutish and irregular multitude, leist the bastions being brok doune, the inundation of a popular fury unmercifully overflow us all. *Melius est*, (says the Emperor Justinian in that excellent Lex. 5: *In quibus causis in integrum restitutio necessario non est* :) *in tempore occurrere juraque intacta servari quam post causam vulneratam remedia quaerere.*

12 Februarij  
1673. *Parti-*  
*buz ut supra.*

To all which it was TRIPLIED by the pershuars pro&ors that the Emperors Walentinian and Valens, in Lege 6, Cod. *De postulando*: discharge Advocats *ut non ultra quam litium poscit utilitas in licentiam conviciandi et maledicendi temeritatem prorumpant*; it's true some freedoms most be allowed in certain cafes, both for heightening the vivacity of debate, and for opening up the merits of the cause, which sometymes cannot be faithfully done without some reflection. But it strikes me with astonishment to see what deall of ridiculous discomposed rage is made by thir defenders out of nothing. If my clients had been traitors to their prince and country, murderers of their nearest relations, &c., they could

not be more briskely assaulted, nor could mo caveats be given to beware of them.

I shall not repeat one syllable of what we urged by our reply, in fortification of our interest to pursue this just and necessary Declarator; I shall only remove what is pretended (against what we pressed) by the defenders in their reply, viz. that the only rational remedy known in law for repressing the debording of magistrates, is by immediate application to his Majesty, and by an inquisition to be taken by his ministers of state *in judicio syndicatus*, then which their cannot be a more groundless extravagance. . . . But I will insist no more upon this, since the defender's own proctors despair of it, and have past from it in so far as they have proponed peremptory defences against the relevancy of our Declarator and entered to debate *in causa*. Fol. 202, l. 11.

TRIPLY.—This Towne of Edinburgh had Acts against Magistrates perpetuating themselves or continuing longer than two years, so have Haddington, Dundee, Glasgow, and many other burrows, so that all the arguments for this defender are answered and decided by the burrow law and practice. The good towne of Edinburgh longed to have this privilege again whereof they had been robbed; they desired, at this last election, to have their 2 year Act revived, and the sanction to be sacred and upon oath; but Sir Andrew took it to a long advisement, yea, I'll say more, all their laws and acts were in vigor and observance till he invaded and cancelled them. Fol. 204, b. l. 58.

And I most farder take leave to informe your Lordships, that the rise, designe, and project of the Decreet Arbitrall, was more levelled to seclude you and the other members of the Colledge of Justice than any other persons within the kingdom; for the true occasion and originall of the said Sett was, that their being an ancient custome of the Towne Councill of Ed<sup>r</sup>, to have alwayes three able lawyers their assessors, with whom they advised in their affairs, and these lawyers being men usually of great parts and abilities, they did by little and little creep in and insinuate themselves unto a share of the government of the burgh, even to that length, that they came to sit with them in their councill, and vote in their leittings and elections, and in all other affairs of the burgh; and being able Fol. 207, b. l. 32.

men, procured themselves sometyms to be choysen Provefts, and of this kind ware Mr. Ja. M'Gill of Rankeillor, and Mr. Thomas M'caullay of Clifton hall, who ware at first the Tounes affeffors only ; and which abuse in the gouvernement being confidered by the neihbours of the Toun, and efpecially the trades, (for the affeffors oft fyd with the merchands and magistrats againft them,) gave the arife to the Submiffion and Decreet following theiron ; for at the election 1582, the three lawyers affeffors coming to counsell to vote at the election, they ware violently debarred by fome craftsmen out of the counsell houle, and after that never more had vote, for much tumult and uproar was about it ; and the flame ftill increafeing betuen merchands and trade, that wife and politique prince, our peaceable James, forced them to compromit all their differences to fo many gentlemen adjacent heritors to the Toun on ather fyde and himfelfe umpire and overfman, and who, after very much paynes and travell in it, gave furth his Decreet Arbitrall and award as we all know. Now this defigne of excluding for ever the members of the Colledge of Juftice from having any fhare in the gouvernement of the city, burfts furth and appears in the very first article of the faid Decreet, (as being the chieff thing theirby intended,) viz. That the Magistrats heirafter fhall be wholly choicen furth of the calling and eftate of merchands, conforme to the 26 A& of Parliament in 1535.

Fol. 208.

Fol. 210, b.  
l. 51.

We know by experience whow eafie ane matter it is to Sir A. Ramfay to pick out a number of 12 perfones at the election (which confifts indeed of 38 perfones, yet 10 perfones of the trades make the election ; for that number being the major part of the chappell, the reft, if they wold be unanimous as they ufe to be, follow the plurality, fo theirby he gains 18 votes) of his ounne confidents and choice ; efpecially, feeing theffe 14 years bygane (joyning his 2 reignes together) he hes been Proveft, and experimentally knows the way whou to pack it, and particular condescendance can be made already upon the perfons he defignes to be Deacons the nixt election. And, theirfor, if your Lordships doe not clearly decerne what fhall be the duty and deportment of the electors, in relation to the contents both of the A&ts of Parliament, Secret Councell, and the Sett, bounding the duration of Magistrats to a year, and their quality to

Fol. 211.

merchandizing, the poor good Toune, shall not only run the hazard to losse their priviledges, but also shall remain in the mist, and be forced to act over again their former protestations against Sir Androw's liting and electing, wheirupon will follow only false reports of imaginary tumults, and other misrepresentations, (as he did already,) and renewing their Declarator.—And now, My Lords, I fear I have forgot Greg. Nazianzen's rule to orators, *stimula equum ad metam* (see *Vossij Rhetoricam Contractam, libro 2 cap. 15 in fine pag. 149*;) whowever, this confidence solaces me, that your Lordships are fully convinced and persuaded of the justice and necessity of our Declarator, in all its parts, notwithstanding of any thing hes been offered by this defender in the contrare; who, if he ware truly our Provest, would assist us in the demand, and against whom we have no more designe in this pershuit, than against you, my Lord Chancellor, or your Lordships of the bench, and all the nobility and gentry of Scotland . . . . In respect of all which, it is hoped your Lord-<sup>Fol. 211, b.</sup>ships will declare their important priviledges to them; and if thir just<sup>l. 37.</sup> indeavors for removing him shall faill, it will be in vain to think that any thing else can stop his arbitrarie carreer of being perpetuall Dictator over this brugh; and who will, by enraged insolence, retorne with 7 devills worfe then the former, so that all the just interest of this brugh, and all the other regall burrows of Scotland, shall be sacrificed to the ambitious designes of one man: wheiras, thir pershuars debate nothing against Sir Androw, wheirin they are not content to share with him, being all weell satisfied, to be perpetually debarred as weell as he, from any sort of usurpation over their Mother, the city of our solemnities, the metropolis of our Kingdome, and the *communis patria* of our law; and so being returned to the same point and words at which I began this famed debate before your Lordships, this, but much more the idea and apprehension of sorrow that I forsee will possesse this miserable place, if you turne your backs upon them, commands me to stop, and choaks my expreffion, that I can proceed no further.<sup>1</sup>

<sup>1</sup> See ane excellent and pathetick description of the desolation and confusion of a Toune taken by storme, out of Fabius Quintilianus in *Gerardus Vossius his Rhetorica Contracta, libro 4. cap. 16. pag. 356.*

Wheirunto it was QUADRUPLIED for the defenders, in so far as concerned the point of interest, and DUPLYED as to the several grounds of the Declarator it selfe.—

Fol. 212.

MY LORD CHANCELLOR, The debate hes run to such a length, beyond expectation, that for me to be tedious, might be so far from being of advantage to my cause, that it might rather prejudicat it; first, with your Lordships, whose patience we have too much abused and encroached upon already, and next, with the disgust of the other subjects who plead a share and concernment in your tyme, for tabling and discussing their interests, as weell as we. . . . . They tell us, again, that he [Sir Androw] hes designed to perpetuat himselfe in the right and office of Provost, and hes a packed Councell that is for him, than which their cannot be a more unjust and unwarrantable calumny; but tho he had designed it, it ware not in his power to accomplish it, so long as the freedome of annuall elections is reserved in favors of the brugh; and I can confidently declare to your Lordships, and will get a great many of the best citizens, both trades and merchanda, to attest it, as being a great truth, and consisting in their knowledge, that their was never a Provost that used lesse endeavors of that kind then the Lord Abotshall, and who never used any other methods for attaining to or continuing Provost of Ed<sup>r</sup>, but the fence of his faithfull endeavors, and great signal services for the interest of the said brugh, and did leave the same intirely to the suffrage and opinion of the electors; wheiras the pershuars of this scandalous and irregular Declarator did leave no means unattempted, by caballing, detraction, menacing, brybery, and other indiret courses and trinketing, to have diverted the late election of the Lord Abotshall as Provost, but which they ware not able to doe: so great and confirmed experience had the Toune reason to have of the Lord Abotshall's fitness and abilities for the said office, and of his zeall and endeavors for the interest and good of the brugh. . . . .

Fol. 214.  
l. 53.

And now, My Lords, I am arrived at ane end of overturning this ruinous Declarator, which is ane absolut and dangerous innovation of all the true liberties of this brugh, and threatens the dissolution and subversion of its priviledges, it impinges upon the Decreet Arbitrall, the funda-



mentall constitution of the gouvernement of the Toune,—it reflects upon the laudable customes and pra&ise of all the honest and intelligent citizens of this brugh thesse 100 years past,—it dryves men upon perjury, and unjustly encroaches upon their fredome and liberty to elect the worthiest,—it's a boutade of popular licence in ane bizzarre multitude against their best governors. And, upon the wholle matter, this scandalous, infamous, and desperat Declarator, albeit it hes occasioned much noise and clamor, yet, Fol. 214, b. upon a serious consideration theirow, there is not the leist cullor or prætext for granting of it, but it resolves in ane absolut innovation of the government of this brugh, and an unparalleled incroachment and insolent invasion of the rights and priviledges both of magistracy and the brugh,—is fomented and carried on upon private mistake and malicious resentments, and hes a most malignant aspect and tendency as to all other publick administrations. And, tho the Lord Abbotshall does neither value nor arrogat to himselfe upon the accompt of the great services he hes done for the interest of this ungrate City, yet it cannot be denied, without the height of base unthankfulness, but he hes been very zealous for all the concernments of the same, and hes been most instrumentall, by his endeavors, to obtain in their favours grants and concessions which concerned nearly both their honor and interest, and which thir pursuars themselves ware forced to acknowledge in the debate; and theirfor it's hoped that your Lordships will in justice vindicate, protect, and secure the honor, interest, and reputation of the present magistracy, against contempt and disdain of a rabble, and give such a determination in prudence, both as to the finding the pershuars to have no interest, and as to the merits and injustice of this most unwarrantable and dangerous Declarator, as will maintain the peace and quiet of this brugh in time coming, and prevent the direfull and fatall effects and inconveniences that such ane dangerous unheard of innovation does threaten to his Majesties interest and to the stability of our government.

The error of this Pleiding lyes in its fulnes and exuberancie; however, Fol. 214, b. upon examination, any repetitions that are in it will be found ather whier l. 24. the argument of the contraire party is resumed in order to be answered,

which is the forme in disputing; or when they are in quite other termes summarlie recapitulat in the end of the answer, reply, duply, triply, &c., by ane *Anacephaleiōsis* for the better enforcement upon, and moving, and refreshing of the Judges memories; and in some places of it, brevity is so far consulted, that reference is made from one part to another. Tho in a narrow scrutiny, their is no doubt but this (as weell as most other wrytings) could admit of large defalcations.

As for Sir George Lockhart's part in this tragicomædy, he acted it to the admiration of all hearers, with so much lustre and advantadge, that tho in other things he surpassed all his rivalls, yet in this he excelled, outdid, and surpassed him selfe; his pungent arguments ware carried in such a torrent and irresistible flood of eloquence, the most impetuous and charming of any thing ever I did hear, he did so chain, and with his tongue draw us all after him by the ears, in a pleasant gaping amazement and constraint, that the wonderfull effects of Orpheus' harp in moving the stones, seemes not impossible to ane orator on the stupidest spirit; and what *Seneca pater, libro 3<sup>o</sup> Contraverſiarum, in proemio*, sayes of Cassius Severus, that eloquent pleider, I found verified in my selfe and others, *Timebamus ne defineret: (vide Voffij Rhetoricam Contractam, libro 2, cap. 15, in fine pag. 149:)* they ware so far from wearieng, that they ware affraid of nothing more then that he should end too soon.

The Lords sequestrated the 15 of Februar 1673, to advise this action and the debate, and, after they had spent neir the wholle forenoon in reading the Informations of both fydes, which course they took heer, and in reasoning with some deall of heat, the result was, that my Lord Chancellor and the President should call the parties concerned and essay ane agreement: which they having done, some of both fydes condescended verballie to submit the difference to my Lord Chancellor's determination; tho the plurality of the Lords was clear to have affoilzied the Defenders from this groundless Declarator. However, the Chancellor ordained, by way of arbitration, the wholle proces, summonds, executions, acts, minuts, &c. to be utterly extinct, supprest, tane of the fyle, and given up to my Lord Provost Abotshall, (which was done acordinglie,) and, in place theirow, decerned ane Act to be past in the Councell of Edinburgh

that no Proveft, Dean of Gild, or Thefaurer, fhall in tyme coming continue above two years at moft; and this to be tane under ane oath and other certifications: At which, fome members of the Toune Councell being unclear, (fee nine pertinent reafons againft that two years a& *alibi apud me; item*, Samuel Cheillie's proteft againft it;) on the 28 of Februar, being the laft day of the Seffion, their was a Decreet of the Lords made, approving of the faid two years a&, and interpoſing their authority to it; and ſo all thir perſhuars pains, expence, and clamor, ended in that which Abotſhall had offered them before. The Toun hes had few quiet dayes for ſome tyme ſince, but *hi motus animorum atque hæc*, &c.—

Whow affairs went in the Toune after this Proceſs, fee ane accompt of, *alibi*, befyde me.

*Summer Seſſion.* June 1673.—The Commiſſioners to the Parliament A. fol. 215,  
for Weſt Lothian, *alias* Lithgow-ſhire, (it was Sir Walter Seton, and No. 388.  
James Dundas of Morton,) having charged the heritors holding of his Majeſty liable to them (and who are but very few, their not exceiding 6 or 7,) for payment of the charges and expences payable to them for their ſervice and attendance at the laſt ſeſſion of Parliament in 1672, conforme to the Acts of Paliament; the faid heritors ware reſolving to ſuſpend upon thir grounds, That albeit it might be pretended (and that not without ſome ſhadow of reaſon and probability) in this ſhire, and theſe others who came but over their doors to hold the Parliament, that they ought to have no allowance at all, ſeing that moſt be ſuppoſed to be given upon the accompt of the trouble and more than ordinar expence they ware at, in being abſent from their ounes homes, and to hold out a rank with, for the grandeur of the kingdome, and the honor of that part which they repreſented; and in compenſation of the damage and loſſe they ſuſtained in their affairs, by reaſon of the ſaid neceſſar abſtra&ion and diverſion, which thir Commiſſioners could not pretend to, ſeing they might both attend, and be few nights out of their ounes houſes; —yet they would not controvert that with them, onlie they ware weil founded upon the Acts of Parliament, to ſie no more than what was juſtly due ather craved or exacted; and theirfor the faid charge behoved to be

suspended till the Commissioners, in the termes of the 35 A& in 1661, shall produce to them a testificat under the Clerk of Register's hand, attesting the tyme and dayes of the Parliament: for, 1<sup>o</sup>, These dayes wheirin the Parliament did not sit, their can be nothing payed for them. 2<sup>do</sup>, If it shall appear any of the Commissioners ware absent any of these session dayes, their's no reason they should have any thing allowed them for that tyme. 3<sup>do</sup>, Wheir the said A& of Parliament seimes to allow them something to carry their charge in going home or coming back, their is no neid of it heir, seing they can ather goe to Ed<sup>r</sup> from their severall interests, or returne, in 2 howers tyme, which deserves no consideration; and yet the 18 A& in 1641, allows the Commissioners of the shirefdome of Ed<sup>r</sup>, for their coming and going, one dayes pay, which is 5 lb.; but that A& is rescinded, except in so far as is revived by the A& in 1661, which passes over that part of the A& 1641, and sundrie other claufes of it, in silence. As for that point, whither or no they should get allowance for each individuall day, from the fitting doune of the Parliament to its rising, without adverting to its session or no session,—and if as to this effect the tyme of the Parliament most be computed to be *tempus continuum* (as is done to the Kings Commissioner,) or onlie *utile*, seimes somewhat dubious; for tho it would appear hudgey reasonable, that it should only be understood of fitting dayes; yet the same reason would dictat, especially in behalfe of those who comes from some distance, that their trouble, their charge, and losse of their privat busines, is the same, as weill the not fitting dayes as the fitting, seing they cannot retire during the intervall to their oune homes, and which being occasioned for their shire and constituents interests, their maintenance ought to be upon their score, seing *officium nemini debet esse damnosum*.

My Lord Lauderdale was so huff'd at this session of Parliament in 1673, that they say he discharged the Register to give out any letters of horning to the Commissioners that served at that Parliament, for their fees, and let them that pleased pershue it by way of action.

found and declared, that he had done wrong in refusing to give them furth their coat of armes with supporters, wheirof they and their predeceffors had bein in poffeffion paft all memory, and never quarrelled till now ; and theirfor that he might be decerned to immatriculate them fo in his Register, and give them furth ane extra& conforme, as is provided by the late A& of Parliament in 1672. The Lyon's reason is, becaufe, by ane expresse letter of his Majesty's, none under the dignity of a Lord must use supporters.<sup>1</sup> But the gentlemen answer, that Lords in the beginning having bein only Barons, and in regard of the confiderable interest they had in their refpectiv fhires, being commiffionat from the small barrons and freeholders to represent them in Parliament, they, becaufe of that credit, got first the denomination of Lords without any patent or creation, and, upon the matter, ware nothing but Barons ; and fo, what is due to them, is alfo due to the other, they originally not differing from the reft by anie essentiall or fuperior step of dignity : So Craig, page 78 and 79. Replied,—Whatever was their rife, the other Barons hes clearly acknowledged a diftin&tion now, in fo far as they have renonced ther privilege of coming to Parliaments, by the 113 A& in 1587 ; and the diftin&tion being made, and thir priviledges renonced by the small Barons in the Parliament 1427. Duplied,—That A& is introduced in their favours, and no wayes debars them, but allanerly difpences with their abfence and the penalty they incurred theirby, &c.—The Gentlemen founds on the *Interdictum uti poffidetis* ; the Lyon faves, It's but *vetustas erroris*, and ane ufurpation. The complainers are the Lairds of Dundas, Halton, Polmais, &c.

Junij 1673.—Manna Kinloch, fpoufe to Jas. Charteris wryter, being Fol. 217,  
conveined before the Lords of Secret Councill, for breaking the Sumptuary No. 397.  
A&, regulating apparell ; two points fell to be fpoke of, but ware not debate, becaufe she was affoizied throw lack of probation : the first was, Wheir a married woman is convict of the breach of a penall Statute, what the effe& of the fame is in law, if it can extend to hir husband to make

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<sup>1</sup> He grants them now to some who ware in possession of them of old.

him liable in the fine, or if it will allenaryly operat to punish hirselfe in hir persone, by imprisonment, or in hir goods, at the dissolution of the mariage. I think it ought not to burden the husband, else many wives, to affront their husbands, or otherwayes be avenged on them, would break it of purpose. But sie this point fully debate, at my observes upon the said Sumptuarie law: sie also the 5th A&t in 1670. The second thing was, If the transgression of that A&t was probable by women, for being at a rousing wheir she was noticed, their was few others save women observed hir. It seimes contrare to law to find it so probable; for albeit they admit women to be witnesses in *puerperio* anent the vivacity of children when born, for carrying the tocher, yet ane absolut necessity is the cause of the singularity their, because, if they rejected women, they should never prove it, it being an A&t transacted commonly by women alone, and none else present; but *regulariter* they are not receiveable, except it be j<sup>o</sup>, in scoldings and small ryots; 2<sup>do</sup>, in crymes of the hyest nature, as treason and witchcraft: sie M. Norvell's opinion on this *alibi*, *apud me*.

Fol. 222,  
No. 412.

July 1673.—One James Gibsone, a baxter in Plaifance, having bein fined for a pretended ryot, in 8 score lb. in the Constable Court, during the fitting of the Parliament in August 1672, he suspended the same, upon thir reasons: 1<sup>o</sup>, that being Constable of that bounds, he was in *exercitio officij et actus maxime liciti*, and being opposed by a drunken wife, to put in a poor persone who was dieng unto a house, he put hir by, and she fell over, and that this was all the ryot; 2<sup>do</sup>, upon the fence of his innocence, he had obtained a discharge of the said decretit and fine, from Mr. John Hay, and Mr. A. S[eton] of Pitmedden, the 2 Constable-deputes, and opposed the same. Replied,—That the Hy Constable Court seimed to be soverain the time of Parliament, and it was *res mali exempli* to have their decreits canvassed or questioned be the Lords: whowever, to the 1 they opposed the decretit, as to the 2<sup>d</sup> the discharge was null, because granted by thesse who had no power; seing, after they had pronounced sentence, they ware *functi officio*, and by the Commiission of deputation, they had no right to the fines or emoluments of Courts. Likeas the Deputies in other Courts had not the amerciaments, but they belonged to their constituents; and heir my Lo. Erroll had [before] their discharge

assigned this same very fine to John Ray, clerk to that Court. Duplied,—*Per l. 37, D. de R. Juris; Qui condemnare potest potest etiam absolvere*, and this upon the matter was an absolvitor more than a discharge, that they had no other salary but the fines, and so might dispose upon them; that my Lo. Erroll's assignation was truly posterior to the discharge, but is antedated: And that judges might discharge their obventions as appertaining to themselves, was clearly decided by the Lords, as D[urie] marks, on the 26 of Nov<sup>r</sup> 1633, Lindsay: Only it was not decided heir, because the matter being referred to my Lord Craigie, he called for the probation, which was the ground of the decreit; and when he had nothing proven, he with indignation rejected it. And really there was much cause of complaint given to the citizens of the Towne, against that Court, not only for being so summary and illegal, but also for their exorbitancy and oppression in their fines. And tho the Towne has ever controverted this privilege with the Hy Constable, so that he never possessed any jurisdiction within Ed<sup>r</sup> peaceable and pleasantly, yet he gained a greater step that Session, 1672, then ever he could arrive at before, by judging Johnston the fidler, and sentencing him to death, for killing of his wife; whereas, in so long a tract of time as the ages since he laid claim to that privilege, he could never afford an instance, save of one,<sup>1</sup> whom, for slaughter, they had sentenced to dy, about the year 1640; but he obtained a remission.

About this same time, [in the month of December 1673] Maccloud <sup>Fol. 230, N. 434.</sup> of Affint was, with much animosity, pannelled for convoking the leidges, &c. He had betrayed Montrose to the States in 1650, and was saved by the generall amnestie and indemnity 1661; and now it was hoped he might smart for it, tho on another cause.<sup>2</sup> The verdict, upon some defect of the probation or tainted integrity of the witnesses clenged him: . . . see the

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<sup>1</sup> [Interlined.] I believe it was one Reid, a painter, for killing one Allane Walwood, servant to my Lord Craustonriddell. [Margin.] See it in the Criminal Register.

<sup>2</sup> In the Indictment it was stated that he did "most perfidiously, treacherously, basely, and inhumanly, under trust, take and apprehend the person of James late Marques of Montrose, his Majesty's High Commissioner and Lieutenant-General, whilst he was invested with his Majesty's Commission under his Highness' Seal for that effect, and delivered him prisoner to the rebels,

Adjournall Criminall Records. The Iuftices found the congregating 100 men in armes made heir a feditious and treasonable convocation, tho it ware not in *exitium flatus reipublicæ*, but only in *exitium flatus privatorum*, viz. my Lord Seaforth ; and that it was onlie without authority, and not againft it. It feemes a fewer number would not infer treason, wheir it is only *contra privatos* : fee Mackeinzie's Criminalls, page 44 ; fee the manuscript E, 4<sup>to</sup>, Januar 1681, Earle of Caitnes, pag. 178.

Fol. 230, N.  
435.

January 1674.—Some wrights and other tradfmen in Ed<sup>r</sup>, having fallen upon one Andrew Foster, a bower, (fee the ftorie in my narrative of Lauderdale's Parliament in 1673, and what followed, it's pag. 82,) and beat him in his oune houfe, they ware conveyened before the Councell for hamefucken : See *Regiam Majeftatem libro 4, capp. 9 and 10, nam unicuique domus fua debet effe refugium tutiffimum*, l. 103, *D. de Regulis juris*, it ought to be ane afyle and fanctuary to him. Sir G[eorge] Mack[enzie] (whom *ex loco fupra citato* my Lord Lauderdale aimed to have got censored for his freedome in pleading this caufe, but loft it) alledged, that they had been provocked to what they had done ; for he had not only

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his Majesty's enemies, then in arms against his Highnefs' authority, by whom the said Marques was cruelly and inhumanly murdered ; for the which, the said Neill M<sup>r</sup>Leod received the number of 400 bolls of meal as the reward of the said treasonable act ; and which meal was delivered to him by Sir Robert Farquhar of Mounzie ;" and that he did "affist the English rebels, under the command of Gen. Maj. Morgan, and conducted them through the Earl of Seaforth his country, which they did burn, waste, and plunder ; and the said Neill did carry and drive away a great part of the plunder, and a great number of cows, horses, and other goods, home with him to Assint, while the said Earl was in his Majesty's service, and not in a capacity to recover them from the enemy. And sicklike did, [in 1669 and 1670,] in an arbitrary manner, impose heavy and grievous taxations upon all ships, both in the Royal Company, and others belonging to the subjects of this kingdom, that did touch ground in the Loch of Inver in Assint, exacting from every ship three shill. sterling, and six pence per last ; ane barrel of ale for the use of the said Neill, and another barrel for the use of his bailye ; ane pair of shoone and four shilling sterling nightly, during the time the said ship lay within the said loch ; and did impose upon every boat that did attend the several ships ane day's fishing weekly ; and did tax and impose the double of the saids burdens upon ships belonging to strangers ; and that by and attour what he had a right to do, and was in use to uplift as heritor."—*Justic. Rec.* Feb. 2, 1674. The Secret Council allowed six shillings Scots per day for his aliment while in prison, to be paid by the Earl of Seaforth, at whose instance he was incarcerate.—*Reg. Sec. Cons.* p. 99.



abused them in his oun house with rude language, but also offered to strike them ; and it seemed to be hamefucken (tho inverted) to the master of the family to offer violence to strangers in his oun house, wheir civility and morality oblidged him to so much the more abstinence from wronging them who had entrusted themselves under his ruiff, as the laws of hospitality are kept sacred amongs all nations, and that he hes more opportunities of affronting others in his oun house then else wheir ; so that it seemes a more rude cryme, enterfairing more, and choaking the nature of mankind, then that we call hamefucken, wheir a man is assaulted in his oun house ; so that, their being delicts on both hands done *ex incontinenti, et in calore iracundiæ et laceffitius, ubi difficile est justum temporare dolorem mutua compensatione tolluntur crimina* ; which the law approves of, *l. 3, p. 3. D. de eo per quem factum erit, l. 39, D. soluto matrimonio : Hippolitus de Marfilijs singulari : 234. Sneiderivinus ad Institut : in editione in 4<sup>to</sup> pag. 136, supra numero 433.* The Secret Councell repelled the defence ; and after imprisonment, set them upon the cock-stule, and fyned them. What if violence be offered to a man in his oun chop, I think it ware not hamefucken, *nam pænæ sunt odiosæ et restringendæ, L. 32. et penult : D. de pænis ; L. 155, p. 2. D. de regulis juris.*

On the last of February 1674, a second appeall was given into the Lords Fol. 234, by the Earle of Aboyne as Commiffioner, and in name and behalfe of the No. 446. Marquis of Huntly, his nevoy, in ane action pershued by the Marquis against Gordon of Carneborrow, and sundry others his fewars, for reducing their fews, as having fallen under his forfaultor, they not being confirmed by the King. The Lords found the defenders few-infeftments good, valid, and sufficient to defend against the forfaultor, especially, the appearand air of the persone forfaulted being restored, and the forfaultor Fol. 235. *funditus tane away, as ab initio null and unjust, and the restitution being non per modum gratiæ, but justitiæ.*

When the Marquis returned from the French camp, my Lord Lauderdale perswaded him judicially to compeir before the Lords of Session, and take up his appeall, and declare he past from it ; and which he did on the 26 of Januar 1675 ; and tho they had promised him not only a new

hearing, but gave him some insinuations to hope a redresse; yet after a 2<sup>d</sup> debate, they adhæred to their former Interlocutor; and so he was ather ill or weell served for his complementing them:—But the tymes were such as no rationall man could expect a re&ification from them of what had once escap't them, tho unawares; they blush't to confesse what is incident to humanity itselſe, (*nam humanum est errare*) wheir their honor was once ingadged at the stake, leift they should inflamme, foment, and encouradge the insolence of many who ware watching for ther halting; and which cenſoriouſnes was improven to that height, that they ware ready of mole-hills to make a mountain, by turning to themselves the wrong and magnifeing end of the prospect, [spyeglaſs,] and even to name and stamp what is juſt, legall, and warrantable, not with the pardonable nickname of ane error and frailty, but even with the moſt intolerable and ignominious brand of downright injustice, partiality, and ſubverſion of the entreſt of the ſubje&, and the ſetled laws of the kingdome. Notwithſtanding all the pains was tane on the Lord Almond to paſſe from his appeall, and take it up, yet nothing hath hitherto prevailed with him to make him doe it; but he lives in hopes to make it riſe up in judgement againſt them, whenever we get a fair and unpræ-limited Parliament; which may be long enough ere we ſee it.

A. fol. 235,  
No. 446.

I have few or no Obſervations by the ſpace of three Seſſions and a halfe, viz. from June 1674, till Januar 1676; in regard I was at that time debarred from my employment, with many other lawyers, on the accompt we ware unclear to ſerve under the ſtri& and ſervile tyes ſeemed to be impoſed on us by the King's letter, diſcharging any to quarrell the Lords of Seſſion their ſentences of injustice, and was not reſtored till Januar 1676; ſo that we ſhall content ourſelſe with remarking a few things that occurred in that gape and intervall.

A. fol. 235,  
No. 449.

In O&tober 1674, Andrew Rutherfoord in Jedburgh, being pannelled before the criminall court for the ſlaughter of James Douglas, brother to the laird of Cavers, having been moſt miraculoſly diſcovered at Tinmouth-theills, beyond Newcastle, as he was going to ſea, and brought to

Scotland: in which proces he raised ane exculpation on thir three heads, 1<sup>o</sup>, A recrimination against Scot of Horfliehill, as guilty of the mortall wound wheirof he died; this was with the designe to cast him, he being one of the most materiall witneses: 2<sup>do</sup>, That, if he did it himselfe, he was *laceffitus*, and it was in his owne defence: 3<sup>do</sup>, That it was not *vulnus lethale*.—See the wholle debate marked at large in other papers besydes me; and heir I shall only point at the heads. 1<sup>o</sup>, The King's Advocat refused to give his countenance and concurse to this exculpation. 2<sup>do</sup>, He forced S. A. Birny, who was for the pannell, to restrict himselfe to one of the heads, on this pretence, that they ware inconsistent and *contradictoria* to say another had done it, and he himselfe had done it in his owne defence, wheiras *reus tam in civilibus quam in criminalibus potest petere contraria hypothetice propofita*. (See the case of the poor of Jedburgh contra the Toune of Edr *supra* 236.) 3<sup>do</sup>, If an Advocat mismanadge a proces by wrong forming of his alledgeances, the party hes 3 dayes tyme in which he may retract what his Advocat confessed in his name; after that, he cannot contradict it, but it binds him. 4<sup>to</sup>, This case of Rutherford's proved of how great importance it is to have the members of assyse brought from the place and country wheir the fact was committed, (*fideles homines patriæ*, the four half quarters adjacent,) and the *fama* most violent, for if the inquest had been burgeses of Edinburgh he might have escaped. See all thir points profecut in other papers *apud me*. In December 1674, he was sentenced to death, for which he blamed much the inadvertance of his advocats.

About the same tyme, Seaton of Carriston falling at variance with another man, gave command to his servant to shoot him; who did so, and the man with much difficulty recovered: Wheirupon it fell to be questioned in discourse how far one was tyed, *ob mandatum criminis*, for bidding or commanding another to commit a cryme. . . . .

A. fol. 235, b.  
No. 450.

In December 1674, William Cockburne, merchant, was in the Secret Councell sentenc't to the cock stule, and banish't the Louthians, and declared infamous, for having defamed my Ladie Oxenfuird in hir honor,

A. fol. 236,  
Margin of  
No. 450.

both in a letter, which Mr. William Clerk advocat, his brother-in-law, treacherously gave up to my Lord Oxenfuird, and in discourse. See more of it *alibi* in other papers *apud me*. See another manuscript at September 1679, page 85.

A. fol. 236,  
b. No. 451.

In the moneth of December 1674, Mr. James Mitchell, supposed to be the man who, in 1668, aiming to pistoll the Arch-bisshop of St. Androis in his oun coach, was ane ill gunner, and with the ball chattered Honyman, Bisshop of Orknay (who was fitting by) his arme; being first discovered at the buriall of Mr. Robert Douglas, the minifter, and apprehended, and examined by my Lord Chancellor before witneses, who promised, if he would confesse and acknowledge it, he should warrand his life: Upon which assurance of impunity, he freely confessed he was the person; but afterwards, fearing leift faith should not be kept to him, he refused, and revoked his confession;<sup>1</sup> and it being emitted extrajudicially, (not in presence of a quorum of the Criminall Lords,) it could not bind him, nor be a relevant ground of condemnation; which makes confessions to be of small effect, unles done in that solemnity I have mentioned. Finding they could not reach him upon this head, the Bisshop caused endyte him as one of the traitors who ware in armes at Pentland Raid in 1666, and made him be tortured and cawed [*wedged*] in the boats [boats], to extort a confession; but hitherto he stands to his denyall, and is still kept in prision.

Januarij 1676.—The Advocats debarred being restored upon the 10th of Januar, our Collection and Observes returne to their former orderly channell.

A. Fol. 238,  
b. No. 459.

In this moneth of Januar 1676, tuo boyes, the one called Clerk, and the other called Ramsay, ware discovered to have poisoned John Anderfone, the merchand, Ramsay being his servant; and that they did it with the help of one Kennedy, ane apothecaries man, and who contrived it so

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<sup>1</sup> *Vide infra* Januar 1678, folio 314, wher he is arraigned.

cunningly, that it might operat lently. And tho some contended their is nothing poisonable in its oune nature, since Mithridates and fundry have accustomed themselves so to it, that it did them no hurt, but turned to their nurishment; and, in particular, what they ministrat to him ware not of a poisonable nature, but only solutive; yet, if we consider the temper of his body, fore debilitat with a flux, their could be nothing more effectuell devised to dispatch him, so that their might be no suspition or jealoufie. And tho his phyfitians ware of opinion that he would probable have dyed however; yet this will not excuse them; since *L. ult. C. De maleficis et mathematicis*, makes him guilty, *qui occidit eum qui jure erat occidendus*; *Ludovicus de urbe Romana Singul.* 747. The tentation they had to dispatch him by this abominable fraud was, he having been for some moneths sick, during which tyme they had stollen some gold, money, and chains; and finding him like to recover, wheiras they hoped he should have dyed, they are surprized and frightened with the fear of discovery of their thift, and theirupon enter in that willanous counsell and combination to make him away. Some tyme after his death, they offering to sell a gold chain, it comes miraculously to light; for they are detained upon suspition and quæstioned how they came by it: And, first, they confesse the thift, and then their having murdered him by poison. The one of them was 17, the other 15 years old. In discourse it was agitat, what if they revocked their confessions? For tho they had emitted them judicially before the justices, the judges competent to such matters, and had reiterat and ingeminat the same spontaneously, and with much ingenuity and sorrow, without any dreadour or fear put upon them, by many persevering acknowledgements; yet, being minors, why might they not have the benefit of revocation allowed to minors *in civilibus* wheir they are læsed, the læsion and hazard being much greater in confession of crymes, and, theirfor, *a majore*, the remedy should take place; (*vide supra*, Mr. James Mitchell's case, num. 451.) and tho their confession was upon oath, yet we know minors are reponed against oaths likewayes, *quia eadem facilitate jurant, qua contrahunt*,—(Mackenzie's plaidings, pag. 53, *et seqq.*) It is true, the civil Cod. *si adversus delictum minor restitui postulet*, refuses restitution against crymes, but heir, *non petunt restitui adversus delictum*,

*sed adversus confessionem delicti temere emissam*, which even majors may retract, as Bouritius tells us, *loco citato* in Mitchell's case; then *multo magis minor, ob fragile et incertum eorum animi judicium*: and Mackeinzie, in his plaidings pag. 209 and 211, is positive that minors may be restored against their confessions, *quando non potest aliter contra eum probari crimen*; where he cites both canon and civil law, *Regiam Majestatem*, and an old decision for it. And all lawyers accord in this, that the *pœna ordinaria* of death is to be relaxed to minors found guilty of crimes merely by their own confessions, and that it is to be commuted into some lesser punishment. Notwithstanding of all which grounds, the two lads were hanged, both in regard of the theft clearly proven, and for example and terror, that the Italian trick of sending men to the other world in figures and possets might not come over seas to our island; especially seeing it was their worst with that odious aggravation, of being perpetrated not by strangers, (which is not so dangerous,) but by his own domestick servant, against whose snares there is no defence but sharpness and severity, they having infinite opportunities to practise it against their masters by mingling it in their meat, drink, cloaths, &c., at their pleasure; and upon this account it is, that Cicero says, *gravius est veneno quam gladio occidere, quia difficilius cavetur*; and therefore, *unius pœna debet esse metus multorum*. . . . . The 3<sup>d</sup> boy, Kennedy, an outed minister's son, stoutly denies; and, not being accessor to the theft, makes it very difficult to reach him, since the infamous depositions of the other two, who were *conscij* and *socij criminis*, are not probative against him, and his accession to the theft cannot be proven, tho' it's likely he was partner with him in the booty [booty.] Many wondered at the King's Advocate, that he subsumed his ditty and libell of the 31 A& Parliament 7, James 2<sup>d</sup> in 1450, discharging the bringing home of poison, under the pain of death; whereas, it's obvious to all, that the A& is obsolete, tho' it may be, it's the greater pity; for that sacred care and fence it makes about our persons is but twigs borrowed from the Roman law,—*Qui venenum necandi hominis causa fecerit, vendiderit, habuerit, præparaverit, plectatur pœna Legis Corneliæ*: (*L. 3, per totum D. ad legem Cornel. de sicarijs.*)

Februarij, 1676.—*Queritur*, If the patron of a kirk, to impede the *jus devolutum* to the King or Bifchop, prefent, before the elapfing of the firft 6 moneths after the vacancy, one that ather embraces not or is not receaved by the Bifchop, and theirafter lets it ly over till neir the end of the other 6 moneths, and, ficklike, prefents a perfon ather unwilling to come or not qualified, he feims fraudulently to fhift and tergiverfe, and to prefent only to fave his right; and will not hinder the *jus devolutum* any longer, and the church ought not to ftand unprovided at his pleafure, but a certain tyme may be limited to him within which he moft effectually prefent, otherwayes amit it *pro hac vice*. This was contended by the Bifchop of Edinburgh in Sir A. Cockburne of Langton's cafe, who keip't his kirk vacant by the fpace of 2 or 3 years by the aformention'd artifice, becaufe he could not get ane indulged minifter; at laft he was forced to accept of a conformift. (See Act 115, Parlia<sup>t</sup> 1592.<sup>1</sup>)

A. 239, No. 462, § 2.

February 1676.—The wrights and mafons of Edinburgh raife a declarator againft the bowars, fclaiters, coupers, painters, glafiers, fivewrights, plumbars, and upholfterers,—two trades againft eight,—to hear and fee it found and declared that thefe eight trades had not the priviledges competent to the maiffons and wrights, nor ware capable of the Deaconrie, &c. As this was negative, fo the faid eight trades did raife a mutuall declarator, affertorie of their priviledges and capacity; in which, in Januar laft, the Lords, after a moft contentious debate, in refpect of the fociall afts clearly proven, and paff memory of man poffeff, found the firft fyve trades had æquall priviledge with the wrights and maiffons, ware members of their incorporation, and not pendicles; and ware capable to be elected deacons; but as to the 3 laft, the fivewright, plumbar, and upholfterer, in regard their affumption was fince the Decreet Arbitrall, and recent, fo that they had not poffeffion requifit to præfcription, the Lords demurred, and declared they would hear the parties farder as to their priviledge.

Fol. 242. No. 469.

<sup>1</sup> If the Bifchop prefent not within 6 moneths, ather in his proper patronages, or wheir the right devolves, then some affirme he amit it *pro ista vice*, and it transmits to his fuperior Archbishop, and he neglecting, to the King.

For which 3 trades it was alledged, that whatever grounds had been urged in the former debate in favours of the coupars, bowars, &c. whose capacity the Lords had already declared, were as binding, pregnant, and convincing in behalfe of thir three, whose privilege was still under controverfy, as they were for the other five: they both have exercisid *eiusdem actus sociales*; thir three trades have ever been in use to fit with the wrights and mafons in their Mary Chapell corporation; they concurred and voted at the election of their deacon; they are masters and box-masters to the calling; they are judges to their essayes and assises by a similitude not unlike to the *pares curiæ*, who were *convassalli ejusdem domini* in the feudall law; they have a share in the trust and management of the interests of the corporation, *ubi onus, ibi et honos*; in all their acts, sealls of causes, assumptions, grants, and other wryts, they are denominat by appellatives importing a society, communion, and an equall participation of priviledges. But since this nather was nor could be denyed by their antagonists, theirfor I would come to the disparity assignd, wheirby it was alledged, thir three trades were stated in a different and worse case then the other five, in so far as they had been assumed since the date of King James his Decreet Arbitrall, and the other five trades were incorporat before, and so were in immemoriall possession, and might rationally be supposed to be comprehended therein; but after that decreet, which is like the Tounes *Magna Carta*, containing the fundamentall and unalterable principles of it's government, they could do nothing prejudiciall theirto, nor assume trades, or communicat priviledges, or any part of the administration and policy of the brugh, to any others, save those mentioned and included in the said Decreet Arbitrall. Notwithstanding of which disparity, I alledged Declarator behooved to pas in favours of my clients, unless the wrights and maifons could say on of thir two (none of which they were able to subsume upon) ather that there was ane let and impediment resulting from some prohibitory clause in the Sett or Decreet Arbitrall, hindring the fourteen trades from assuming new callings unto their corporations, or else that the particular admissions of thir three trades are limited, and coarctat *ad speciales effectus*. As to the first, tho it were enough to me to say, that it is a negative which proves it selfe, ay till they condescend wheir and how it was pro-



hibit; yet I will deall more liberally with them, since it's eafy to demonftrat that the Decreit Arbitrall, nather as to it's words nor meaning, does debar the trades from affuming new ones; for 1<sup>o</sup>, Their is no legiflator or judge can be fo quick-fighted (tho you would allow him Argus his 100 eyes,) when he is ftatuting or judging, as to have all the future contingencies, all the *cafus novi et incogitati*, under his view and confideration, that may afterwards emerge: But the Lawyers give advice in fuch cafes, that is, *qui jurisdictioni præeft, illud ad fimilia producere interpretatione et jurisdictione fuplere debet*. 2<sup>do</sup>, Though all events cannot be provided for, yet it's manifef, from a refervation in the Sett, that fome fuch thing hes been in their eye; for it's expreffly provided, when any good head or overture, tending to the weell of the crafts, fhall be propofed by any deacon or tradfman to the Councell, the fame fhall be instantly authorized by ane A& made theirupon; of which kind the affuming of trades, wheirby they are much uncited and ftrenthned, is undoubtedly one. 3<sup>tho</sup>, *Ubi eadem remanet ratio, eadem debet effe juris difpofitio*; but fo it is, whatever reafons perfuaded the modelling and reducing the feverall affociations and companies of trades, which were then in being, under fourteen deaconries, the fame militat ftill to enforce the neceffity and reafonablenes of affuming new arts and trades that come in request, or fpring up with the genius of the age, and which ather ware not formerly, at leift not fo frequent; and which reafons may be reduced to thir 3 heads: The 1. fhall be the conftitution and governement of the brugh upon folid and lafting foundations, which, in all democracies, whither fupreame or fubalterne, can be attained by nothing fo weel as be ane æquality among the citizens, which is very rationally tempered and ajufed in this Decreet Arbitrall, by a proportion rather geometrical then arithmetical, *habita ratione dignitatis perfonarum*; for the merchands and trades being the 2 poles wheirupon the intereft of Ed<sup>r</sup> rolled, the great Councill of the brugh, confifting of 38 perfones, was made fo to fhare the Toune's adminiftration betuen theffe two competars, that the merchands make 20 of the number, and the Crafts 18, wheirof 14 are Deacons, the other 4 are Councillors. At the tyme of the framing of this, their was above 28 trades incorporations in Edinburgh; all of them behooved to be reduced

and moulded into 14 deaconries ; the rest of the trades then in being ware not annihilat, ware not turn'd out of the Toune, but ware brought under such and such deaconries, to which they boor the nearest analogie and semblance. 2<sup>do</sup>, As the gouvernement of the Toune required that the trades should be reduced to a definit number, that in votes they might not overpower the merchands, so the intrest and utility of the trades themselves is extreemly concerned theirin ; for theirby they dilate and extend both their number and power, and holds up their number, incaise any trade, such as at present the Furrier, should decay and faill ; and they get no small accession to their common purse theirby. And how thir wrights and maiffons come so far to deviat from what their predecessors judged to be of so great and important advantage to them, may seem a paradox ; for they may remember, during the late animosities and debates, manadged with so great heat and zeall in 1661, betuen the merchands and trades, on of the main articles of the Merchands greevances against the Trades was, that tho their ware but 14 Deacons mentioned in the Sett, yet they had engrossed and assumed many other trades under their deaconries, for fortifieng and strenthning themselves, and for perpetuating the faction. What hes diverted the channell, I know not ; but *Timeo Danaos et dona ferentes* ; and to the present agreement betuen the merchands, and wrights, and maiffons, against thir other trades, may be properly applied that, old politique maxime *Divide et impera*. 3<sup>o</sup>, As the gouvernement of the City, and the advantage of the trades themselves, persuaded them to be listd and ranked under deaconries, so the interest of the subiect was not a litle concerned theirin, viz. That their should be no independent trades, nor wagrant tradefmen, allowed to work at randome, without tryall and inspection of some perones of skill and understanding, to oversee their work, that the leidges be not cheated and abused with base and insufficient work. As thir ware the reasons that evinced the usefulness of reducing and fixing the Trades under particular corporations, so the same militat as pregnantly now ; for their can be no more but 14 Deacons still ; the interest of the trades is much enlarged by thir assumptions still, the peoples security against bad work requires the samen still ; so that the assuming of new trades can never be imagined

to have been prohibit. 4<sup>to</sup>, As the words of the Sett, and reason and meaning theirow, make for me, so also custome, *quæ est optima legum interpret*, stands on this fyde; for in the incorporation of the Hammermen, their are eleven trades, such as spurrier, sadler, sword-flipper, &c., all assumed; of which their are 4 or 5 taken in since the date of the decreit arbitrall; and yet even some of thesse lately assumed trades, as particularly the coppersmith, have been actual deacons of the Hammermen, which unanswerable proves their is no difference as to the tyme of the assumption, whither before or after the Sett, as is pretended. And wheiras the wrights and maiffons frame an argument from the acts of admiffion of thir three trades, as if they ware limited and qualified *ad speciales effectus*, only to work in their own trades, and not to participat priveledges;—That it is answered, in so far as their admiffions are indefinit, and not exclusive of their capacity, they, in construction of law, most extend to all priveledges; *nam favores sunt ampliandi, et indefinitum æquipollet universali*. 2<sup>do</sup>, Wheir it allows them to work in such and such work, which fell not naturally and properly under the subje&t matter of their oune occupation, the same is so far from being taxative, that it's demonstrative, and in their favors, and is ane evident amplification and enlargement of their liberty, beyond what the limits of their calling would have borne them to; and *quod in alicujus gratiam conceditur, non est in ejus odium detorquendum*. Now, freedome being that which all men naturally covet, thir pershuars ambition swells no hyer than to be declared freemen, and not slaves, to be capable of the deaconrie, not to be deacons; and since in all their common evidents they are designed *confratri* (for *confratres*), let their animosities be this day buried, and all ordained, by your Lordships decreet, to live together like bretheren in unity.

The Lords declared in favors of thir three trades, that they had æquall priveledges with the maiffons and wrights, as weell as the other five, who ware incorporat and assumed before 1583, at which tyme the Decreet Arbitrall was made. See betueen the Peutherers and Plumbers in another manuscript 4to., Februarij 1679, page 58.

Februarij 1676.—I have heard some Hudibrasse the *initialia testimoni-* A. fol. 243,  
No. 471, § 1.

See Mck's  
plaidings,  
pag. 82.

*orum*, viz. the examining of witnesses upon their age, their being married or not, &c., as ane impertinent and insignificant old style; notwithstanding that the same is very necessar to be interrogat and insert; for 1<sup>o</sup>, If the witness be found lying and trinqueting in thir, it vilifies and derogats much from the weight and faith of his testimonie: but many Doctors think that *falsum* committed by a witness *in extrinsecis, non facit testimonium corruere in totum*. 2<sup>do</sup>, By this it's knowne if the witness be past 14 or 18; before which time a witness is not supposed to know the hazard of ane oath, or to depone with judgement. The 3<sup>d</sup> reason is, to distinguish them from other men bearing the same name or designation. 4<sup>th</sup>, If they be deponing in *re antiqua*, the telling their age invalidats or adminiculats their testimony; as they ware then of years capable to discern or consider such things, which most alwayes be things falling under one of the 5 fences. In Saxony, Vefember tells us, they goe a greater lenth, and interrogats the witness anent his wealth and riches; for if he be poor, he is suspected as more liable to be tempted. This is coincident with our vulgar objection against witnesses, viz. that he is not worth the King's unlaw, estimat to 10 lb. Scots; but we set it at so low a rate, that it renders the declinator altogether impracticable; for there is scarce any witness brought in, but he is clear to affirme he is worth that,—his cloaths, if roused, would be of that value. It should be fixed at 100 lb., or something like that: since all that's acquired by money hes growen, the price of that should augment also, especially in this age, wherein the faith of witnesses was never more lubrick and vacillant, nor ever so much perjury discovered; so that it's a most commendable part in our law, to leive as litle to the credit and probation of witnesses as can be; for it allows them not in a case above 100 lb. Scots; and really this way of probation cannot be restricted enough, considering the impudence this generation has arrived at.

Fol. 244,  
No. 473.

To shut up this Winter Session 1675, and Januar and Februar 1676, with a remark should have been set down in the beginning of it, because it happened then, viz. Captain Martin's escape furth of the tolbuith of Edinburgh, whair he was imprisoned by command of the Lords of Session, till the event of a plea depending against him, upwards of 5000 lb. ster-

ling's value of goods he had in a manner by piracy taken out of a ship he pretended to be a lawful prize. One night he made his escape in weemens apparell ; and Patrick Wans, keeper of the tolbuith, upon a petition given in to the Lords of Session, got himselfe affoilzied of all negligence upon his part, that so the subsidarie action might not recurre against him, after the debt for which he was imprisoned was constitute against him ; which would have been very difficult, he being escaped, and they having had many things which required clearing by his oath ; which absolutor proceeded also on this 2<sup>d</sup> ground of law, that his escape was meerly *casus fortuitus qui nulla humana prudentia provideri poterat*, and so could not be attribut to omission in point of duety ; and yet it was cryed out upon as most unjust, both as to matter and forme, in that it would not hinder but he might be conveyen by the creditors for Martin's debt, they not being heard, and so *res inter alios acta* could not prejudice them. (Vide *supra* Nov<sup>r</sup> 1672, num. 374.)

In May 1676, Hamilton of Reidhous having killed one Armor in Leith, and instantly *fere in flagranti crimine apprehensus*, the Magistrats of Edinburgh doubted if their priviledge extended to judge him for the slaughter. I informed them, if it had fallen out within the Toune and suburbs and parts annexed to the Royalty, their was no doubt but they might judge him, being Shireffs within them selves ; or if the accident had happened within the Canogate, or priviledges theirow, they had uncontroverted right to cognosce upon homicide, as Lords of the Regalty of Brughton ; yea, might repledge from the Justice Generall ; at leift, if it was ane ecclesiastick regality, he had power, by the 29 A& in 1587, to fit and vote with the Criminall Judge ; but their power in Leith being only *qua* Barons, come in the place of Logan of Restalrig, their jurisdiction as to life and death within thesse bounds was not so clear : For tho Barons are infest in pit and gallows, and, by the old laws of *Regiam Majestatem*, might judge slaughter tane reid hand within 3 furs, else it de-

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<sup>1</sup> Yet the Water-bailzie in Leith is thought to have ane ampler jurisdiction on the shore. Vide *supra* Jullij 1671, numero 233.

volved to the immediat Judge ; yet, by a generall practife to the contrare, they are fallen into ane absolute defuetude of this priviledge, fo that one may think it loft, if fuch things can prefcryve. Yet fee Hope's Compend, cap. 8., of the power and jurifdiction of Barons, Shireffs, Lords of regality, &c., who attributes this power of condemning, within 3 funs, to the Shireff, and not to the Barons ; fee A& 142 in 1436.

Fol. 245,  
No. 475.

June 1676.—Elizabeth Kirkaldy, Lady Kirknes, and Robert Douglas of Kirknes, hir fone, *contra* the E. of Morton, Robert Dempfter and other their accomplices, before the Secret Councell, for acts of riot and opprefion, in feizing upon the perfhuars boat they had been in poffeffion of, upon the Loch of Lochleven, and paffing theirin, and turning of all their beafts ware pafturng on the Inch of Lochlevin, called St Serfs Inche, *Sancti Servani infula*, and their taking away the faid boat, and detaining it ftill. Sir John Cunyghame was of opinion that this could fcarcely amount to a Councell bufines, being only a fpulzie, with which the Councell medled not, but referred them to the Judge Ordinar, the Lords of Seffion, unles they had fomewhat importing a ryot conjoyned with it ; that is, that ather violence was offered to perfones, or a turbulent and unwarrantable convocation of at leift 10 perfones to boaft men from their rights, ware libelled : fpulzies ought not to be perfhued before the Secret Councell, till firft they be civilly profecute before the Lords, or other judge competent, as is determined by the 33 A&t in the Parliament 1535, *in calce*. A ryot is ather made up by a convocation of the leidges, without authority and warrant of a Judge or Magiftrat, and their be a gathering at leift of 10 perfones, for the law fayes, *Decem faciunt turbam. l. 4. par. 3. D. de vi bonorum raptorum l. ult. D. de abigeis* ; yea, in 1664, in a cafe of the Shireff of Aberdeen, who had convoked the leidges, to throw doune fome cruves put up in forbidden tyme, againft the A&ts of Parliament. The Lords for the future difcharged fuch convocations, becaufe not only gave umbrage, but sometymes ane occaiffion and ryfe to tumultuary ryots and diforders ; or a ryot is when the perfones have weapons, and offer violence to houfes and perfones ; for fuch *tenentur lege Julia de vi publica et privata, vide iftos*

*titulos D. et Cod. Item titt. vi bonorum raptorum et unde vi.* But the driving away of goods, or taking away, and detaining, another mans boat, without violence, by the number of 10 present, is a wrong, unwarrantable, and oppreſſive act, and a ſort of abigeat and theft, but is not properly a ryot; and, therefore, to make it relevant and ſuſtain it at Councell, we libelled 1<sup>o</sup>, a convocation of 12 or 13 perſones, armed with hagbuts and other weapons, who firſt endeavored to break Kirknes his boat, and thereafter threw out their cattell unto the Loch, to their hazard of drowning had they not ſwimmed, &c., with this deſigne to get the clame once to probation; and tho every circumſtance ware not made out, yet ſo much fact could be proven, as would agravat and evince a very illegall and arbitrary attempt. It was alſo adviſed that the Lady Kirknes, *via facti*, ſhould without violence put in her beaſts again to paſture on the Inche, ſince ſhe was *incontinenti* and recently ejected, ſhe might *eodem modo* recover and continue hir poſſeſſion. All the defence they had was, that the Earles of Morton had a right to that Inche, the Lairds of Kirknes had none, and their poſſeſſion was but precarious and by tolerance, and ſo could never found a right,—that all they did was only by way of civill and legall interruption; but this was ſo ſlender to get them aſſoiled, for if they had a better right, they ſhould have entred to the poſſeſſion by the orderly way of perſhueing a removing, and the Councell is only to conſider the wrong, and not the point of right, (which belongs to the Judge Ordinar,) and ſee who is diſpoſſeſt, and ordain them to be reponed, according to that undoubted maxime, *ſpoliatus ante omnia eſt reſtituendus*. It ended in ane amicable tranſaction; and Sir W<sup>m</sup> Bruce, who had bought the Lordſhip of Lochleven and Kinroſs from the E. of Morton, gave Kirknes 3000 mks. for their kindnes to the Inche, and for the right of ane old compring they had upon the eſtate of Morton, but not within year and day of Oliphant of Gaſk's, E. of Kinnoull, and others.

As for libelling formall and dire& ryots before the Councell, they aſſume in this, as in all other caſes, arbitrarenes enough ather to find themſelves competent, or to refer them to the Judge Ordinar, as they affect. I remember in 1668, Mr. John Wiſeheart having perſhued the

Laird of Guthrie's chamberlaine and tennents for tacking away a heck he had put on the river forgainst his lands of Balgayes, and which intercepted the eills and other fishes to come doune from a loch to Guthrie's eill ark, wheirin he was *per expreßum* infest, and in immemoriall possession without interruption. The Councell, tho their was no violence, ordained the heck to be put up again, reserving the point of right to be discuft before the Judge Ordinar by declaratory. Item, in David Pringle, chirurgian, his libell against the chirugians of Edinburgh in 1670, they sustained the libella, tho they concerned only acts of that incorporation, and finings upon the breach and violation their of; only it was a point of priviledges, and wrongous imprisonment was also libelled. *Infra numero 485.*

Fol. 245,  
No. 476.

June 1676.—A skipper's wife in Dyfert is pershued before the Criminall Court for adulterie, confest, and suspition of murder of the child borne; 1<sup>o</sup>, In regard she constantly denied her selfe to be with child, till shee was, by ane order from the Bailzies of Dyfert, fighted by midwives and other weemen, who declared shee had borne a child; tho shee had called hir swelling only a hydropisie or tympanum, till shee was so confounded with the clear prooffs, that shee could no longer get it denied but shee had borne a child, which could not be to hir husband, for he in a discontent had gone to sea, and stayed in forrain places for 2 years space from hir. 2<sup>do</sup>, That living in a toune and a neighbourhood wheir shee had opportunity of aid and assistance to help the birth, shee had not made use of it, and so was in *dolo pessimo* to alledge it was still borne, since it was hir oun fault it was stifled, (tho it had been so suffocat,) shee not imploring help, which was easy for hir to doe; according to that presumption of the Mosaick law, esteeming that a rapt, wheir the woman cries, or is at such a distance as their be none at hand to rescue hir, so shee is oblidge to cry, and neglecting it is repute guilty; and the like distinction is also admitted by the Doctors in the cryme of exposition of infants; for ather they are exposed in a solitary place, which makes the law presume a clear intention and designe of murder, *qui alimenta denegat is necare videtur si modo alimenta habeat*, l. 4<sup>a</sup> D. de agnoscendis et



*alendis liberis, toto Titulo C. de infantibus expositis, ibique Perez in Commentario*; or they are laid in a public place, *ad captandam misericordiam transeuntium*, and this is reputed more pardonable. 3<sup>uo</sup>, Shee had hid the child in the buggers [rafters] of the house, and by inspection it was found to be wholesome livelike and come to the full maturity, and some probabilities of præfocation. The criminall Lords put hir to the knowledge of an inquest, and they found, by the witnesses adduced for proving hir confession, that shee was guilty of adultery, and clenged hir of the rest of the dittay; whereupon shee still remains in prison, no sentence as yet being pronounced against hir. In strict law by our Acts of Parliament shee may be put to death, but our practise hes not seconded our law, which is regretted by many; and it seemes unæquall that one shall be hang'd for theft, and not for adulterie, especially where its notor, as in this case, by procreation of children. We have few instances in our Criminall Books, where adultery was vindicated with death,—onlie about one or two;—the first in March 1631, hir name is Marion Alstoun, but shee was also loaded with presumptions of having made away the child; the other in 1645, called Thomfone, but shee was both a minister's daughter and wife, and had committed the adultery with a minister, and feigned a testimonial. See them in my abridgement of these records.<sup>1</sup>

July 1676.—On Margaret Wilson, spouse to Smith, merchant Fol. 251,  
No. 486.  
in Glasgow, upon suspicion of the slaughter of one Wallace, an officer's wife their, in so far as shee beat hir so that shee contracted sickness, and dyed within 14 or dayes, is apprehended and incarcerated by [James] Dunlop of Housell, bailzie of the Regality of Glasgow, and keeping hir fundry moneths in prison, and never bringing hir to a tryall, it may be expected somewhat should have been given him, as Felix did from Paull. I advised and drew a bill for hir and hir husband to the Lords of Secret Councill narrating the fact, and earnestnes to have hir innocency put to a tryall, and the great inconvenients to hir health, fame, and family, by hir continuance in prison; and concluded that the Lords would ordaine

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<sup>1</sup> See September 1678, Knox, it's pagina 25.

the said Bailzie depute ather to infist and give hir a dittay, and put hir to the knowledge of an inquest, betuen and a competent day, which they would præfix, or else, upon sufficient and unquestionable caution, to reproduce hir to underly the law, whenever shee should be called, to fett hir at liberty; or if he was not clear to medle in it, that shee might be transported to Edinburgh, and referred to the Justices. This was to supply the defect of our law in wanting that wryt they call in England *Habeas Corpus*, by which any prisoner can bring him selfe to the bar, within 48 howers, and cause his accusers ather infist against him, or take bayle for his reentry if the cryme beailable:—This bill was not red, because the Bailzie of the Regality promised to hold a court on hir within a moneth. I think the Councell would have granted one of the 3 alternatives; since they are the competent judges to injust and wrongous imprisonment.

A. fol. 246,  
No. 477.

6 July 1676.—Patrick Wiseheart, as sone and executor confirmed to George, late Bischop of Edinburgh, pershues the Comisars of Edinburgh and their collector for payment of the Quote of the Testaments of all persones who deceissed within the dioceffe of Edinburgh before the death of his father; they suspend on double poinding, against him and Mr. Alex<sup>r</sup> Young, present Bischop of Edinburgh, who acclaimed them as truly belonging to him, in regard they ware not confirmed till his entry to the said office, and so the consummation, and not the inchoation, of the A& most be considered. In this competition, the Lords fand thesse Quots fell under the last Bischop's anne, and so preferred Mr. Wiseheart theirin: In which the present Bischop had small losse, since at his decease the like will befall to his executors, as a part of his anne: See for annates, my observes on the A& of Parliament in 1672. This decision differs from the arrest of the Parliament of Savoy in a parallell case, observed by *Gothofredus a Bavo, in praxi sua criminali pagg.* 86 and 87: A lord of a mannor fermes his lands, together with the jurisdiction of holding courts, and reaping the emolument and obventions theirow; one committs a delict, and is procest for it; during the dependance, the tenant's right expires, and the land is of new fermes to another; he resumes

the dittay, judges, condemnes, and amerciats : *Quæritur*, To whom the mul& belongs, whither to him in whose tyme of his right the cryme was perpetrat, or to him who pronounced sentence? That Senate determined in favors of the second.

Jullij 1676.—Mr. James Ramsay, Bifchop of Dumblaine, having A. fol. 251,  
No. 487. charged Francis Kinloch of Gilmerton, upon his generall letters, to pay him 8 chalders and a halfe of wi&uall, being ane annuity mortified by King James in 1620,<sup>1</sup> furth of the lands of Markill, whei of the said Francy is heritor, to the Deanrie of the Chappel-Royall, which is annexed to the Bifchoprick of Dumblaine ;—he fufpended upon this reason, that the said annuity was originally granted in 1587 furth of theſe lands, by the then Earl of Bothuell, to Mr. Thomas Craig, advocat, redeemable upon the payment of 7000 m&ks., and upon Bothuell's forfaulter, fell to Lennox, then to Buccleuch, the donators. Buccleuch diſponed theſe lands to the Earl of Winton, for the behoof of Sir George Seton ; which Sir George payed the 7000 m&ks. to the King, and got a grant of redemption ; which right is now in the fufpender's perfone by progreſſe : So it being extinguished, the fufpender's lands are free ; and the King being ſenſible thei of, wrot to his Exchequer that ane equivalent annuity, in place thei of, might be ſettled upon the ſaid Deanry furth of his few-fermes. To which it was Answered for the Bifchop,—That the reaſon ought to be repelled, in regard, he and his predeceſſors have peaceably bruiked the ſaid annuity by the ſpace of 50 years, from 1620 till 1672, and that Francis the fufpender payed peaceably from 1661 till 1672, by the ſpace of eleven years ; that after ſo long poſſeſſion he was not holden to debat what right his Majeſty, who founded the ſaid annuity, had thei to ; but it was ſufficient for him, being a benefited perfone, to prove this annuity was a part of his benefice, and poſſeſſed ſo ; and *ſecundum regulam Cancellariæ Apoſtolicæ*<sup>2</sup>, (*ſuper qua*

<sup>1</sup> See 13 Januarij 1680, in another Manuscript, Nunton and the town of Kirkcudbright, page 109.

<sup>2</sup> Vide Stair's system, Tit. 12, Of reall rights, num. 25, pag. 181 ; wheir, in my animadversions apart, ſee 2 difficulties againſt this *Regula Cancellaria* ; 1<sup>o</sup>, It ſeems contradictorie why *triennialis*, and again *decennalis* ; that's unintelligible. 2<sup>do</sup>, It ſeems diſſonant to our law, and contrare to that Act of Sederunt in 1612, appointing 10 years poſſeſſion before the Reformation, and 30 years poſſeſſion ſince ; viz. ſince Auguſt 1560, as the 55 Act of Parliament in 1573 bears.

*vide Gomezium, in commentario ad dictas regulas, in beneficiis triennalis et decennalis possessor non tenetur docere de titulo, but that possession habetur pro justo titulo :* And the pretended redemption falls within the tyme of the A& of Parliament, restoring Bischops, in 1662, rescinding all A&s done to their prejudice, and restoring them to whatever they posselt in 1637. Replied for the Suspendor,—That the rule anent *decennalis* and *triennalis possessio* is but a presumptive right ; and tho it may maintain beneficed persones, wheir they are not able to shew any more, yet wheir his right can be condescended on, is founded upon, and produced, as heir in this case, and is found to be null and extinguish't by payment, that rule will not proceed ; and it is just of the nature of the A& of Parl. in 1584, anent retouring quinquenniall possession in favors of the King, which proceeds *præsumptive*. 2<sup>do</sup>, The rule of the Chancery is derogat from by ane expresse A& of Sederunt, altering the space, and setling 20 years possession of benefices to be the rule before the Reformation, and 30 thereafter. 3<sup>o</sup>, Rights of lands in our law cannot prescryve with lesse than 40 years possession. 4<sup>to</sup>, Possession that induces a right and clear title in favors of churchmen or others, most be peaceable and uninterrupted ; but the charger's was *turbata*, by Declarators, &c. Duplied,—The *Regula Cancellariæ* was not merely a præsumptive, but a full and compleit title ; because wheir a beneficed persone posselles lands or rents during that space as a part of his benefice, *lex statuit super præsumpto tanquam vero præsumptione juris et de jure, quæ omnem probationem in contrarium respuit ;* for if beneficed persones ware oblidged to debate their founders rights, it would shake the foundations of the most part of benefices in Scotland, who have nothing to shew but a provision, and possession conforme ; a preparative that all our Bischops and Clergy are concerned at in the hyest degree. Nather does any defence arise *ex græmio* of the charger's title and right ; the same being by his Majesty purely, simply, and absolutely constitut, without any qualification or reversion ; so that he can never be oblidged to debate upon extrinsick grounds not contained in the foundation, especially *hoc loco* in a suspension, since it cannot be presumed he knows the conditions of his author's rights. And, notwithstanding of the grant of redemption, Francis still continued to pay ; and being conscious of

the invaliditie of his oun right, he procured from his Majefty a precept upon the Exchequer for 1000 lb. sterl. in lieu of it; and if he had gotten payment of that, he would never have made contradiction to the Bifchop's right; likeas he payed not a 6 pence to Whyte for that annuity, fo that he is *in lucro captando*.

The Lords, by their interlocutor, fufpended the Bifchop's letters fimpliciter, and found he had no right to the faid annuity, and theirfor affoizied Francis, and declared his lands free theirf.—This decifion made all people to talk largely of bribery and partiality; for at this tyme, Francis, and Mr. Rogueheid the clerk, his fone-in-law, ware contriving to give Halton, and fome other perfones, 5000 lb. sterl. in gratuity, out of the Toune of Edinburgh's revenue and cash; which, as it made this goe fmootherly, fo it alfo anointed the wheells of the following caufe, betuen the fame Francy and Abotshall. The Bifchops ware agaft at the Interlocutor; for it is undoubtedly of bad influence and example, to teach men to brangle their rights, the moft of them leaning merely upon poffeffion. The Prefident took pains to appeafe and mitigat them, and drew up reasons in fortification of the Lords fentence, (which was ftollen throw at ane unfrequent afternoon's meeting,) proving the juftice and legality of it; and gave the Bifchop of Galloway, Mr. Jo. Paterfon, a copie of them; and which foftning plaifter, knowing many watch for their halting, he ufes in any other controverted interlocutors. But it feemed very unjuftifiable that, in a fufpention, rights of lands, and fuch like titles, fhould have been fo fummariely difcuff and annulled; for old forme dictats that poffeffion is to be continued, *Interdicto uti poffidetis*, and the validity of the right remitted to a reduction. But their answer to this is, that they could not have legally nor warrantably judged upon his title and right, if it had not been produced, which they could not have forced him to have done in a fufpention; but they being once produced, and *in campo*, and found invalid, the Lords might instantly judge upon them, as if they had been in a reduction; and if he had defended on his naked poffeffion, without founding on a title, it had been more fecure for him, for that would have burdened Francis with the producing and proving the nullity and invalidity of his title.—Yet, on the 21 Februarij

*Supra numero 446.*

1677, the Bifchop of Dumblaine having produced a clear and undoubted right and progreffe to that reverfion, he gain'd the caufe againft Fr[ancis Kinloch], and the letters were found orderly proceeded.

A. fol. 284,  
No. 566.  
Vide *supra*  
Jully 1676,  
*numero* 487.

5<sup>to</sup> Junij 1677.—Tho in February laft, the letters were found orderly proceeded, at Mr. Ja. Ramfay Bifchop of Dumblain his instance, *contra* Francis Kinloch, yet he had got it ftopt to the 1 of June; and now again, upon a bill pretending he would take off their 40 or rather 80 years peaceable poffeffion by interruptions, (without condefcending on any in particular,) Francis prevailed fo far as to get a new ftop, for producing his interruptions, till the 16 of Jully.

A. fol. 256,  
No. 489.

Jullij 1676.—The differences betuixt the Earle of Argyle and name of Macclean took up many dyets of the Secret Councell all this moneth: He had denounced, gotten letters for fyre and fword againeft them, and neir forced them to the feilds in their oune defence, and all upon patched-up clames and decreets in his oune Courts, for contumacy, (wheiras they durft not appear,) or pretended cafualties of fuperiority, as efcheits, wairds, non-entries, releiffs, &c.; wheiras many of their predeceffors were killed in the late King's fervice, and fundry of themfelves carried eminent badges of loyalty about them; and he was the fon of the great<sup>1</sup> tranfgreffor, which made their cafe favorable, tho Argile had walked legally and warily enough in all he had done. But his ambitious grasping at the maftery of the Hylands, and Western Ilands of Mull, Ila, &c., ftirred up the Earle of Seaforth, Marquis of Atholl, Lord Macdonald, Glengary, M'Cloud, and other clans, to enter in a combination for bearing him doune, (like the confederat forces of Germanie, Spain, Holland, &c., againft the growth of the French,) who netled him fo, that they not only procured to that Name a fufpenfion of his charges, but a protektion for them to come over; and ordained him to make a juft, faithfull, and impartiall accompt of what was truly refting him; by which they minded to loop off confiderably of his clame,—which compt he was moft averfe too.

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<sup>1</sup> But in November 1676, the favor of the Macleans ebbed low, and Argyle obtained certification and intercommoning against them. See 10 Octobris 1678, pag. 26.

They also hounded out upon him Mr. Rory Mackenzie, advocat, brother to Tarbet, to whom he was owing 8000 mks., who charged him, and presented a caption to Sir Wm. Sharp to be signet; who kept it up 2 or 3 days, till my Lord Argyle made all the haste he could, trussed up bag and baggage, and away to Striveling; and lest he should be overtaken there, or his furniture pointed, (which is of more value than that summe,) he quickly retired to Innerary, and caused carry away all his plenishing to a secure place in the Hylands above Stirling. Mr. Roderick took instruments against Sir Wm. Sharp, for keeping up his caption, and stopping that diligence which should be free and current to all the liedges.—He pretends a warrant from the President, yet he is capitulating for the debt: they pretend a privilege and power they have to keep and detain captions and other writs 24 hours, especially if those against whom they are directed be persons of quality or Privy Councillors; just as magistrates of burrows will keep up captions till they advertise the parties, on the pretence they may stay the 2d charge; but if instruments and protestation be taken after the 24 hours for not giving them further their diligence, according to the ordinary course of law, and that they may be liable in cost, scath, damage, and expences, and for the summe; I think the Keeper of the Signet may be made liable for the debt, just as the clerk to the bills may, if he take insufficient caution wittingly.

*Supra* 25  
Janu. 1672,  
num. 311.

6<sup>th</sup> *Septembris* 1676.—One John Scot, a Quaker, and inhabitant in Leith, A. fol. 258, having been fined by William Carmichael, baron and water bailie of Leith, in 100 dollars, and banished the town of Leith, for brewing upon the Sunday, and (when challenged upon it) speaking before the said bailie and Mr. John Hamilton, minister there, most irreverently and profanely, alledging he might as well brew on the Sunday, as Mr. Hamilton might take money for going up to a desk and talking, and throwing water upon a bairnes face. Scot gave in a bill to the Secret Council, denying, at least extenuating his fault, and complaining of the exorbitancy of the Bailie's sentence, far beyond the power and jurisdiction of a pædaneous judge, as he was, and far contrary to the trust and duty of a magistrat, who, as he had many occasions and opportunities of oppressing by reason

b, No. 493.

of his power, so if he abused and prostituted the same to his base and unworthy covetous ends, he deserved to be the more severely punished; that the Lords of Session had oft found that the fyne of a baron bailzie ought not to exceed 50 lb. Scots, (yet this I find in Durie's Practiques to be only in caise of fyning for absence and contumacy;) that all punishments ought to be proportioned and commensurat to the fault, that banishment was one of the hyest criminall punishments nixt to death, depriving us of liberty, which we value in the next degree to our life, and that heir it was to scale his family and overthrow his very way of sustinence to banish him Leith.<sup>1</sup> Answered,—His guilt was extraordinary and enorme, the bailzie of Leith's jurisdiction was ample, and any magistrat might banish out of his owne territories and bounds. He was ill set, for he had both magistracy and the clergie, who sollicitid stronglie against him, for both of them would be baffed if the sentence ware found unjust: The Councell ratified the Bailzie's sentence, and interponed their authority theirt; wheirupon Bailzie Carmichael arreisted and feized on 80 bolls of malt, the said Scot had payed 10 or 11 lb. the boll for, when wiðuall was dear, and caused appryse and adjudge it to him for his 100 dollars.

A. fol. 257,  
No. 492, § 3.

July 1676.—*Queritur*, The Roman law, in *lege ultima, in fine, C. de Affessoribus*, discharges *ne quis judex vel affessor sit in ea causa in qua advocanda patrocinium mutuavit, ob præsumptam affectionem*: which, tho very rationall, yet to our regrate is not observed with us; for our law puts so entire a confidence in the honesty and integrity of the Lords of Session, that, by 212 A& in 1594, it allows no grounds of declinator against thesse senators, unless they be father, brother, or sone; and in Sir W<sup>m</sup> Bennet of Grubet's case, against Moor of Otterburne, in Decr 1671, (*supra num.* 283,) they would not extend it to the King's Advocat, his brother-in-law; see Mck's Observes on the A& of Parl. 1621, pag. 66; and theirfor it will not hinder, nor can he be declined on this accompt, that he was one of the partie's advocats in that cause, which is to be judged: yea, farder, in my Lord

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<sup>1</sup> The King's Advocat thought banishment a criminall sentence belonging to a hyer jurisdiction then a Baron Bailzie hea.



Dumfermeling's action against the E. of Calander, (which see *supra num.* 480,) Sir D. Falconer, Lo. Newton, being advanced to be a Lord of the Session, voted in that cause, notwithstanding, by a declinator given in against him, he was intreated to decline himselfe, not only in regard he had been one of Dumfermeling's advocats, but furdur, (which seemed strong,) because *prodiderat et præcipitaverat judicium et suffragium suum*; in so far as the Lords having appointed that cause to be a part of his triall, by resuming the hail debate, and giving his oune opinion on it first in their presence, conforme to the modell of tryall appointed in June and July 1674; he did so, and concluded with his positive judgement in favours of my Lord Dumfermeling, which the Lords repelled, referring it to his oune discretion; who choiced to vote, tho it had been lesse suspicious for him to have forborne.

6<sup>to</sup> *Septembris* 1676.—The Earle of Dumfermeling (besyde the civil <sup>A. fol. 259,  
No. 494.</sup> proces mentioned *supra num.* 445 and 480) pershues the Earle of Calander for a pretended ryot, alledged committed some 17 years ago, in meddling violently with some cattell and other goods pertaining to his grandmother, the Countess of Dumfermeling, and who was married to the last Earle of Calander. Alledged, *Post tantum temporis intervallum*, such trifling acts of wrong ought not to be permitted to be awakened, *ne injuria sopita recrudescant ad perichitandam pacem et tranquillitatem publicam*: that the Roman law most justly terminated *actiones injuriarum*, *spatio annali*, and by diffimulation and familiar converse together, as also put a period and præscription to the accusation of all crymes not insisted in by the space of 20 years after the commiffion. (See amongs the ouvertures for a Parliament, the abridging the pershuit of pœnall actions.) Answered,—We were heir within the time allowed by the Roman law; 2<sup>do</sup>, Nothing excluded pershuit in our law but 40 yeirs.—The Lords of Secret Councell admitted the libell to probation; and Dumfermeling having led witnesses, who proving they ware the common goods betuen Calander and his grandmother, and that as husband he was repute proprietar, and tho he had renounced his *jus mariti*, yet it recurred, (*id falsum*,) at leist it was *probabilis ratio, et quævis causa etiam fatua et bestialis excusat a spolio*. Dumfermeling finding thir witnesses made not for him, he gave in a bill craving

a farther diligence against witnesses, for proving his libell: to which Sir G. Lockhart made an answer for Calander—1<sup>o</sup>, That the dyets of the Councell were peremptor; 2<sup>do</sup>, That the desyre was against the forme and practise of all our Courts and Judicators to crave warrand for citing in witnesses upon a 2<sup>d</sup> diligence who were not contained, nor execute against, in the first; and hoped the Councell would not gratify any by the subversion of the fundamentalls of law and forme. On this expression my Lord Halton laid hold and aggravated it extreemly at the Councell Board, affirming it was worse then their appeal, and if such insolence and reflections past unnoticed, the grandeur of the Judicators might suffer diminution, and urged he might be censured and brought upon his knees for it, since other of his brethren had done it for lesse (viz. Sir R. Saint-clair.) The Chancellor, with his usuall dexterity, parried this thrust, telling that the lawyers at the table were the fittest judges of the expression, for if what was affirmed was law, then he conceived the advocats could not be hindred to insert it in their consultations,—if not law, then let them be punish'd. This pointing at the Advocat, he stood up and told he could not deny but what was their asserted was law, but he thought advocats ought, even in representing law, to use submisse, moderat, and discreet termes and expressions: for, since he heard Sir G. Lockhart offered at his place as King's Advocat, he hes keip't a peik at him. Halton answered,—It being a point of forme, the Councell were masters of it, and it ought not arrogantly be obtruded to them; however, the Councell was not disposed to any censure, and he lost his barking. S. G. L. said he would have gone to prison sooner then have acknowledged an error or crav'd pardon.<sup>1</sup>

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<sup>1</sup> On the 5<sup>t</sup> of December 1676, the Councell, notwithstanding they had advanced this far in it, at last fand they could make nothing of the probation, shifted themselves of it as more proper to the Lords of Session, and theirfor referr'd it to the Judge Ordinar, which was no time after litiscontestation and probation led and ready to be advised; this was ridiculously to admit a no proces after a peremptor, but in the reasoning and debate, they inclined to think (tho' not urged by the advocats,) that this ryot of Calander's fell under the Act of Oblivion, Indemnity, and Grace, published by the King and his Councell on the 24 of March, 1674; but that I cannot see. The Lord Dumfermeling obtain'd an order of the Inner House to call it summarly, and it was a fresch debate.

I have heard of ane A& of Sederunt, at leift a consuetude, wheir a Lord of the Seffion retires upon a dimiffion; becaufe of the character he once boor, he takes place of all that are admitted afterwards on the Seffion, tho they be a&ually Senators, and he not. This holds wheir his *missio* is *honeſta vel cauſaria*, but not if it be *ignominioſa*. A. fol. 244,  
No. 471, § 5.

27 July 1676.—Sir Androw Ramsay of Abboſhall *contra* Francis Kinloch. (See this cauſe mentioned *ſupra* in June 1673, *numero* 400.) It's a Reduction, Improbation, and Declarator of Francis his right to the lands of Gilmerton, wheirin the caſe was deduced to the Lords in the Inner-houſe thus:— A. fol. 252,  
No. 488.

The deceit John Hepburne of Waughton being forced by the neceſſity of his affairs, and the common iniquity of the tymes, in *anno* 1652, to wodſet his lands of Gilmerton, (which ware a proper part and pertinent of the barronie of Waughton,) to Mr. John Cockburne, advocat; the manner of the ſuirty and conveyance they agried upon was, that Waughton ſhould grant him a hæretable and irredeemable right, and Mr. John ſhould, by his back-band and formall letter of reverſion apart, declare their was no more intended but a wodſett, redeemable upon the payment of 15,000 lb. Scots to him, his airs or affigneyes, and of the expences he ſhould wair and employ upon building, providing alwayes the ſame did not exceed the ſumme of 1000 mks. Scots. Waughton being one who truſted more to other men's manadgement then his oune, and Mr. John being an exact man and ane able lawyer, and punctuall to have every thing performed to him, it was no wonder that Waughton and he differed, and that Waughton deſired at any rate to be rid of his neighbourhood. F. Kinloch is perſuaded, by one Henry Kinloch, a couſin of his oune, and a domeſtick ſervant of Waughton's, to enter upon that game; Waughton and he ſtrikes hand, joyne iſhue, and agree, that Francy ſhall pay Mr. John Cockburne his money, and take Mr. Cockburne's wodſet right he had on theſe lands; wheirupon Mr. John Cockburne is required to take his money, to which, after ſome difficulty, he condeſcends; ſo then Francis obtains ane hæretable and irredeemable right and diſpoſition to the lands of Gilmerton from Mr. John Cockburne and his wife, with

consent of the laird of Waughton; and for salving and securing all their intrest, (just as Mr. John Cockburne's bargain and sirty was,) he gives a backband or declaration of the same date with the disposition to him, and so is *pars contractus*, and more then *pactum incontinenti adjectum contractus bonæ fidei*; by which he confesses, albeit Mr. John Cockburne had disposed these lands irredeemably to him, yet the truth was, Mr. John had granted a reversion of them upon the payment or consignation of the forsaide summe of 15,000 lb. Scots; and theirfor, leift that deed should be a contravention or commission of the warrandice given him by Mr. John from fact and deed, he excepted the said reversion from the warrandice, and then adds, Likeas he accepted of his oun right and disposition, with the burden of the said reversion; and which last words and clause was undoubtedly taken and intended for the security of Waughton, and for præserving and holding up the reversion which otherwayes would have been extinguished by Waughton's consenting to Mr. John Cockburne's absolut disposition.

This being the state of F. Kinloch's right to the lands of Gilmerton, S. A. Ramfay having matched his sone with the aireffe of Waughton, and having, both with great paynes and considerable summes of money, near adæquat to the worth of the lands, acquired the haill appryfings and other reall rights affecting that estate, did first essay all soft and moderat courses of settlement with Francis; but these amicable overtures proving ineffectuall, and being slighted, he was much against his inclinations forced to the *ratio ultima regum*, to intent this Reduction, Improbation and Declarator against this defender.

As to the clearness of the conception of this ticket to preserve and hold up the reversion, Sir George Mackeinzie confessed, that he red [it] 6 tymes over ere he understood it: and the first 5 tymes he thought it founded and imported a reversion; but the sixt tyme, by help of right information in point of fact, he became convinced it meant no such thing, —to shew us how plausible falsehood may be, and at how small a distance, throw our darkned understandings, it may seeme to be removed from truth. Upon this, Sir Geo. Lockhart had a smart reparty, that the 5

parts of his judgement was more to be trusted and credited then the 6<sup>t</sup> part, which was but the dregs and taplash of his wit, tho cleared by a new light; in another part, he had the defender ranter [to join] the two ends of ane inconsistency, he was urging, together. Sir Jo. Dalrymple had another fling, that the controverfie was not so much for the land, as for the gaudie mounting he had trimm'd it with; meaning the house he had built.

On the 27 of July the Lords advise thir depositions, and the hail proces and debate; and by one vote, find Francis his right irredeemable; and theirfor affoizies him from the Declarator. Their ware 14 Lords fitting on the bench at the voting it; the 5 lawyers in the house voted it to be a redeemable right, and only a wodsett, viz. the King's Advocat, Newbyth, Goffuird, Glendoick, and Sir D. Falconer, Lord Newton: their ware 6 votes for it's being ane irredeimable right, viz. Halton, Colinton, Strathuird, Pitreichie, Reidfurd, and Forret; Nevoy and Castlehill ware *non-liquets* in the case; the Prefident was not discovered, since it was gained by one vote for Francis ere it came to him, so he lurked; Craigie was ordinary in the Utter-house. Their ware 2 neck-breaks of this cause; the first was the Chancelar's staving up stairs in the revifing or thresfury chamber the tyme of the advyfyng, (which he knew of); and not only so, but detaining my Lord Kincarden with him, who was clear for Abotshall, (for Atholl, Argyle, Lauderdale, the other 3 extraordinars, ware 2 of them at London, the other attending on the committy betuen him and the name of Macclean,) and Castlehill's neutrality, contrare to many assurances: The Chancelor's faint trinqueting and tergiversation for fear of displeasing Halton, (who agented passionately for Francis,) hes abated much of his reputation. The 2<sup>d</sup> rub in Abotshall's way was a largeffe and donative of 5000 lb. sterling, to be given to Halton and other perfones furth of the Tounes revenue, for their many good services done to the toun. By this they outshot Sir Androw in his oun bow, turned the canon upon him, and *justo Dei judicio*, defait him by the tounes publict interest, with which weapons he was wont to doe miracles, and had taught them the way. . . . This decision for its strangenes surprized all that heard of it; for scarce ever any who once

heard the case, doubted but it would be found a clear woddsett; and it opened the mouths of all, to cry out upon it as a direct and downright subversion of all our rights and properties.<sup>1</sup> . . . . .

A. fol. 257,  
No. 491.

July 1676.—The Lord Mordington being incarcerated in the Tolbuith of Edinburgh for debt, gives in a petition to the Lords, craving to be sett at liberty, in regard his creditors appryfers, and other infesters, had all his estate in their possession, and he was content to dispoñe the reverfion to any the Lords should think fit, to the effect it may be sold for their payment. The Lords refused the bill, alledging, his lawyers who had drawn it (Sir George Lockhart was the penner of it) knew not the laws nor A&ts of Sederunt; for, by ane A&t made on the 21 of July 1675, the Lords ordain the creditors who incarcerat or arreift to be cited, and called, and heard, to object against the bill, (and which ought also to be by a bill of suspension, relaxation, and charge to put at liberty,) which he had not done; and heir they would not consent to his liberation upon his disposing of the Scots estate, unles he also made over to them his English entreft; which he conceaved, as the Scots law could never reach, so it could never force him to denude of it; and, tho their ware no A&t of Sederunt for it, naturall æquity persuades that the parties interessèd be heard, (*l. 8, D. de Aqua, et aquæ pluvie arcendæ.*) Then Mordington caused cite, and require them all by a nottar, before witnesfes, conforme to the said A&t, and produced the intimation with his bill. The Lords again reflectèd on his Advocats, and found it not sufficient till he raised a summonds of *bonorum*: and yet the method aforfaid might seeme equivalent, and to be dispenced with in a nobleman; but he was a Hamiltonian. Then the President, upon a bill, gave him a deliverance, permitting him to goe abroad in the day tyme with a guard, he alwayes returning before 8 a cloak at night; it alwayes being on the Magistrats their perill if he made his escape: with which quality it was just as good as no licence; it took back with the on hand what it gave with the other; and the Magistrats would not obtemper that warrand, since they could do it

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<sup>1</sup> A full report of this case is printed in Brown's Supplement, vol. iii. pp. 78–91.

without such ane order, if they minded to run the hazard. At laft, in Februar 1677, the moft part of the creditors confenting, Mordington was by the Lords fett at liberty, without a formall *ceffio bonorum*: which feem'd ftrange.

July 1676.—*Queritur*,—What is to be done with Quakers and Ana-<sup>A. fol. 257,</sup>  
baptifts, who are alfo called *Mennoniftæ*, who refufe to fwear? Whither<sup>No. 492, § 1.</sup>  
they are to be holden as confeft, if they be parties, or compelled to depone, if they be led as witneffes? Joannes Bouritius, in *Traâtu de officio Judicis*, cap. nono, pag. 18, ouns the affirmative, fince their humorous peevifhnes is not to be indulged or encouradged by law, nor the truth theirfor to be concealled, elfe they fhould be in a better caſe then the orthodox; he alfo fhows, *ibidem*, the way of fwearing Jews, viz. by cauſing them lay their hand on the Decalogue, and repeiting the 3<sup>d</sup> command, *Non assumes nomen Domini in vanum*. With us, if theſe phanatick ſectarians be content to declare the truth as in the prefence of God, (which many of them are willing to doe,) the Lords accept of that (as in the caſe of Burnet, tutor of Leyes,) as fufficient and æquipollent to ane oath.

6<sup>to</sup> Septembris, 1676.—My Lord Halton, Threfurer-Depute, as coming<sup>A. fol. 259,</sup>  
in the place of the late Earle of Dundee, by the gift of *ultimus hæres*,<sup>No. 495.</sup>  
obtained a decreet at Secret Councell againſt the toune of Dundee, finding, that as Conſtable of Dundee, he had the haill criminall jurifdiction within that brugh privatively, and the civill cumulative; and theiron hes exped a ſignator, and took infeftment about this tyme in that his jurifdiction at the Mercat-Croce of Dundee: This inſignificats their privileges as a brugh royal.<sup>1</sup> They have raifed a declarator before the Seſſion againſt Halton; but as it is now pack't, they can ſcarce expect ordinar juſtice their, and may weell fortify his right by a decreet *in foro contentioſo*, which even the ſubſequent Lords will be tender to reverſe: ſo it ware more adviſeable

<sup>1</sup> The leaſt that can be granted them as a brugh royall is a barron's power,—*Mixtum imperium ad vindicandam et explicandam ſuam jurisdictionem ſine quo ſubiſtere nequit*; L. 2. *D. de jurisdictione*.—A German has wryt *de jure conſtabularij*.—*Vide infra ult. Nov<sup>rs</sup> 1676.* Halton and Dundy, and the citation their from another manuſcript page 62.

that *res* be left *integræ in statu quo* till ane æquall hearing can be got; for it seemes uncontroverted that he arrogats and assumes more than ever Scrimgeor of Dudhope had, who ware men inferior to none in vanitie and pride; for their power was only to keep the King's peace, and guard the toune of Dundee during the tyme of a fair, during which their was a great resort and confluence of strangers and much bargaining and drinking, and so a probable few quarrells might ensue: And this was the only reason for which I find Constables ware ordained in burrows-touns. Our burrows of old ware so inconsiderable, they needed this auxiliarie assistance: as Kennedie of Carmucks was Constable of Aberdeen, and Erskin of Din was Constable of Montrose; and for their pains in guarding the toune during the tyme of their fairs, they had some obventions and casualties and fines. Hence I find, by the 60 and 61 A&S of the Parliament 1456, complaints ware given in against the Constables of Castles as a greivance, in exacting strefles of the subjects that came to the fairs with their creams, and which oppression is forbidden till the Parliament consider [whither] their infestments bear them to these exactions or not. And to prove that the Constable's power was not universall all the year, but only at set particular tymes, the jurisdiction of the Hy Constable, the Earle of Erroll, is ane convincing argument theirow; for his power was only during the fitting of the Parliament in that toune wheir it held, for guarding the King, Nobility, and members of Parliament, and his old wryts bears 4 miles about. See the Report in 1631, sent to the King by some he had commiffionated for that effect, containing ane accompt of the Hy Constable's priviledges.

*Queritur*,—If the Constable of the Castle of Edinburgh hes any jurisdiction within the toune during the tyme of their fairs?

A. fol. 259, b. 10 *Octobris* 1676.—One Major Henrick Balfour, borne in Sueden of Scots parents, having tane a commiffion as a privateer, or a letter of

marque, from the King of Sueden, for bringing up all Danish and Dutch ships, and their allyes and confederats, and keeping it blank in the name, &c. coming to London, and agreeing with one Captain Pidgeon, who did out-reik a frigate, and went together a caping; and, having taken 2 prizes,



the one uncontrovertedly juſt being a Dane, the other belonging to the citizens of Weymar, (*Wiſmarium*.) within theſe 12 moneths belonging to the Croun of Sueden, and tane from them by the Danes, and ſtill in their poſſeſſion. Upon this Balfour and Pidgeon differed, Pidgeon contending he would have it made prize; Balfour concerned himſelfe to have the ſhip liberat, becauſe his maſter the King of Sueden look't upon Weymar as his oune country and ſubjects ſtill, tho in the Daniſh poſſeſſion, and, theirfor, will'd that none of their ſhips ſhould be moleſted as enemies. The conteſt turnes ſo hot, that after they have put their two prizes into Leith, and their caper and frigat, by ſtreſſe of weather, is driven to ſea; Pidgeon, by force, threats, and the aid of the men aboard, extorts by oppreſſion and bangiſtry, the blank commiſſion from Balfour, and fills up his oune name in it. At laſt the frigat getts into Aberdeen, wher Balfour, by his truncheman, complains to the magiſtrats how Pidgeon had violently robbed him at ſea of his commiſſion, and had filled up his oune name in it, and was reſolved to ſlip to ſea with it and the frigat, tho he was a party owner of it. Upon which representation, the Bailzies of Aberdene cauſed call Pidgeon before them, and finding he had tane the commiſſion from him, and lately filled up his oune name in it, they ordained the commiſſion to be exhibit and ſequeſtrat in their Clerk's hands, till the Secret Councell, or Judge Ordinar, the Admirall, ſhould determine who had beſt right to it; and of conſent took the ſaills and anckhors from the frigat till they ſhould peaceably agree. As for the Weymar ſhip brought up as prize, the Judge-Admirall laid on his arreſtment upon it till he ſhould cognoſce upon the matter; for within the ſea-mark the Lords of Seſſion's letters of arreſtment and poinding are no warrant, but the Admirall's; notwithstanding wheirof, William Carmichael, water bailzie of Leith, upon application theirafter made to him by Captain Pidgeon, did bring the ſaid ſhip to the harbor, and break the Admirall's arreſtment, and liver the ſhip, and intromit with fundrie of the goods theirin, embezill the corne with which ſhe was loadned, and take away a cable worth 100 lb. Engliſh. Upon this matter of fact, their ware 2 libells for pretended ryots perſhued before the Secret Councell, in this moneth of O&ctober: The firſt was, at Captain Pidgeon's inſtance,

against the Magistrats of Aberdeen, in oppressing him, taking his commission from him, securing and stopping his frigate, impeding his journey to his great damage, and concludes restitution of the commission and sails, and to be decerned in 500 lb. sterling, *nomine damni*. To which I answered, for the Magistrats, that tho they were not obliged to answer, in regard their ware not 15 dayes betuen the day of their citation and the day of compeirance, which is requisit in all libells before the Councell, and much more benorth Dee, (*vide* 25 A& Parl. 1600,) yet they ware so conscious to themselves of their oune innocency in their demeanor and deportment, that they ware willing instantly to be tryed; and theirfor their defence was, they had done no wrong, because they had done their indispensible duety for securing the peace, and protecting a stranger in their harbor, keeping the affair inteer, they not having medled with the point of right, but meerly sequestrat the possession, *ne occasio fierit majoris tumultus*: (*Vide Tit. extra. in decretalibus, de causa possessionis et proprietatis*.) That by Pidgeon's oune confession, it appeared he had lately filled up the commission, and that it was originally in Balfour's possession. If Judges and Magistrats be staged and impannelled, and abstracted from their administrations, because they did their duety, then miserable shall their condition be, and at that rate no man of honour will embrace it; —that cannot be a ryot the omission whei of would have been criminall: If they had not done what they did, they would truly have contracted guilt in refusing a necessary consequent of their government: *Satius est* (*sayes l. 5, C. in quibus causis in integrum restitutio necessaria non est*) *in tempore occurrere, quam, vulnerata causa, remedium querere*. This is a libell whei of none else could have been guilty but a stranger. Magistrats are invested with a publick capacity; they represent his Majesty; they are guardians and watchmen within their oune bounds and precincts, and answerable for disturbances, if they might, by their authority, have prevented or coerced them; let him then know, that the justice of our nation, conforme to the laws of all other polished kingdomes, makes a difference betuen ane injury done *privatæ personæ et publicæ*, and that our old A&s of Parliament have wisely check't, and severly punish't, any who, without reason, misrepresented or murmured Judges and Magistrats for doing their offices.

The Lords found the Magistrats of Aberdeen (their was only one present in name of the rest, viz. Bailzie Gilbert Molyfone,) ware so far from having done any wrong, that they gave them solemne thanks for doing their duty, and affoizied from this groundles libell; and, for his calumny, fyned Pidgeon in 20 lb. sterling of expences, to be payed to the Toune; and ordain'd him to ly in prisson till he payed it;—but they could have made his frigate doe it.

The second libell was at Balfour's instance, against Pidgeon and Bailzie Carmichael, narrating how he had obtain'd a commission, agreed with Pidgeon, and who, under the King of Brittain's flag, had treacherously seized upon and beguiled a ship belonging to the toune of Weymar, had by oppression tane his commission from him, and, tho he was an Englishman, had filled up his owne name in it, contrare to the King's treaty of peace, and articles theirow, past at Breda, both in 1667 and 1673, betuen his Majesty and the Stats Generall of the United Provinces; and that not only so, but by all means fought to gett the said free ship declared prize; and, to enhance it the better, he and Bailzie Carmichell entred in a paction together, by which Pidgeon sold a part of it to Carmichell at a shamefull undervalue; who theirupon, contrare to the duty of a magistrat, and without all regard to the Admirall's arreistment laid upon the said ship, (which is a soveraigne and supream jurisdiction,) he caused liver the same, and hes fraudulently abstracted, embezilled, and intromitted with sundry of the goods theirin, which not only is the cryme of forning and oppression, prohibit by many Acts of Parliament, and the constant practise, but is also a manifest and downright prostitution of the honor, interest, and authority of magistracie, who, by whow much more occasions they have of malversing, are both the more dangerous and intolerable, if they abuse their power; and which was so much the more insolent that it was palliated, and plaistered over with fair and plausible pretences, and an abusive cullor of a legall and orderly procedor, tho nothing could indeed be committed more disorderly; for, having caused cite the complainer Balfour before him, tho he had no imaginary jurisdiction or right of cognition in the matter, both because most incompetent to a *pædaneus judex*, as he is, as also because the Admirall's undoubted

jurisdiction was founded by prevention in laying on the arreftment : And, first, in refusing Mr. David Gray, proctor for the complainer, a fight of the libell, which is against the laws and practise of all nations, *juxta ipsius defensio* being *juris maxime naturalis*, and never was a fight denied to a defender. Nixt, he wrongously imprisoned Balfour, upon the pretence of not finding caution. 3<sup>do</sup>, To show the unanswerable informality, præposteration, and injustice of the Bailzie's sentence, it's decerned on the same day that a fight of the libell is refused, and that same day *cautio*, both *judicio fisti* and *judicatum solvi*, according to the custome of these courts, was offered, and yet it was decerned, so great præcipation was used ;—and theirfor concluded reparation of the damage, and punishment in their persons. To this it was answered, 1<sup>o</sup>, That Pidgeon was a Frenchman, and had lived long their, and so was not tyed by the King's *privatæ leges belli vel pacis*. 2<sup>do</sup>, Denied absolutly all paction betuen Bailzie Carmichaell and Pidgeon anent the enhancing that ship, or their embezilling hir loadning. 3<sup>do</sup>, For taking the commiffion, denyes any violence, but that it was given him voluntarily, as being hail owner of the frigat. 4<sup>to</sup>, Balfour discovers in this complaint *propriam turpitudinem* ; for the taking a blank commiffion for caping is *contra jus gentium*, seing in all commiffions *personæ industria eligitur*, and the Prince, granter of it, should cause them find caution, and must be answerable for their actings if they exceed their warrant. 5<sup>to</sup>, In cases of ryots in any Court, and even before the Councell itselſe, no fight of the proces is given, because the dyets are peremptor, and they get a full copie of the libell ; and, since they may come *instructi* and *parati*, their procedor is summarie, *de plano sine strepitu et figura judicij*. 6<sup>to</sup>, As to the pretended breach of arreftment,—1<sup>o</sup>, It ought to be repelled, because Bailzie Carmichell knew nothing of it ; 2<sup>do</sup>, As *ignorantia* excuses, so *quævis probabilis causa* does, and which ware heir ; for 1<sup>o</sup>, *Constat* from the toune of Edinburgh's charters that they have ane admirall's jurisdiction within the shore of Leith ; so that it is a greit mistake to call him a pædaneous judge, only the Toune ware forced to restrict that clause in their charter, —see the compend of the Toune's statuts *apud me, anno 1636*,—and, whither the Toune's right and jurisdiction theirin was valid or not, was

cumulative or privative, Bailzie Carmichell was nather oblidge to know nor to debate; 2<sup>do</sup>, The corne was heating in the ship, and their was danger of setting the ship on fyre, and not only it, but the rest of the ships in the harbor. I think the fear of heating and spoiling was reason enough, and as to the fying of ships, it's ridiculous, for corne separat from the straw cannot fyre: some alledge, in a stack it may; others say, it will smoak and consume away their, but never fyre of it's oun accord; however, I think an arreiftment hinders not such cases of necessity for præservation: What, if a barne yeard which had been arreifted ware on fyre, might not one, without the leift breach of arreiftment, medle with the cornes to save them and pull them out of the fyre? It's ridiculous and against all charity to imagine such a restraint: befydes, breach of arreiftment is a pænall action *de dolo*, and so *quævis causa excusat*; and repeated the former grounds against empannelling and murmuring of judges for doing their duety, or even for every mean escape. Likeas Mr. William Aikman, as proctor fycall for the Admirall, compeired and craved their Lordships would ather remit the cognition of the affair to the Admiralty, at leift would be pleased to cognosce and decide with caution, tendernefs, and reservednefs to their arreiftment and interest.

The Lords referred that part of the libell anent the taking of the commiffion from Balfour by violence, and the merits and grounds, if the Weymar ship was a juft prize or not, to be tryed and cognosced by the Admirall;<sup>1</sup> found the alledgeance of necessar intromiffion for præservation, relevant to affoilzie Bailzie Carmichael from breach of arreiftment, and assigned him power to prove the same by witnefses; upon which they having deponed affirmative, the Lords affoilzied him from the libell, which was clamorous enough. The nixt day the Admirall keip't a Court, in which he affoilzied and freed the Wifmar ship, becaufe it was brought up by ane Englishman ufing a Suede's commiffion, contrare to the King's articles of peace. 2<sup>do</sup>, He cancelled the commiffion, both becaufe *ab initio* tane blank; 2<sup>do</sup>, becaufe filled up in ane Englishman's name; 3<sup>do</sup>, becaufe done by open force,—that fo none might afterwards be abused or deceived

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<sup>1</sup> He about twenty dayes after this made his escape out of the tolbuith of Edinburgh.

theirby. 3<sup>uo</sup>, He ordained Pidgeon's frigate to be liable for the damages and embizilments done to the said ship.

A. fol. 261,  
No. 497.

11 *Octobris*, 1676.—A feild conventicle having been keip't upon the lands of Pentland, Sir John Gibsone, one of the late Clerks of Session, is fyned by the Secret Councell,<sup>1</sup> as heritor theirow, in 50 lb. sterling, upon the late A&t of Secret Councell in Aprill 1676, declaring the proprietor of the ground shall be liable for the conventicles keip't upon his land. It was alledged by Abotthall for Sir John, that it ware a cruall streitch to extend the A&t to him, feing it could rationally be interpret to mean no more in æquity, but to curb the fond inclinations of such heritors and landlords as ware found to be disloyally inclined, or disaffected to the present government in church and state; and a farder prospect and designe the said A&t could not have in nature: But, as for Sir Jo. Gibsone, all knew he boor the marks of loyalty and sufferings about him, and was, beyond all exception, favourably principled as to the government; and was lying sick, of which, in all probability, he would never recover; and, tho he had been weell, it exceeded his power to have resisted or dissipated 2 or 3000 men. Halton, who had a peik at Sir John, answered, the A&t was generall and indefinit, without a distinction, and it would be a convincing prooff of their impartiall justice if they shewed they had no regard of persones;—*Tros Rutilusve fuit nullo discrimine habebō*, and that he had his releiff of them who ware present at the Conventicle reserved by the A&t, and he might as weell have dispersed them, as my Lord Colinton did, and for which he had the Councell's thanks. Answered, That the tenentry of Scotland was so low, that they had much ado to pay their masters ferme, much lesse pay fines for Conventicles; and it ware a unpleasant task to make masters executioners for harassing and beggaring of their tennents. Nothing would doe, but the Alexandrian sword of a vote did cut the Gordian knot, *tanquam ratio ultima regum*.

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<sup>1</sup> In changing or taxing of holdings in Exchequer, they ensnare the party by offering him the declaration if they suspect him. See Act 2<sup>d</sup> in 1670.

*Eodem die.*—The Earle of Linlithgow having exhibited a complaint A. fol. 261, b. No. 498, § 1. againſt Alexander Milne, Proveſt of Lithgow, that he had refuſed ſome of his ſogers quarters and vivers in his toun, as they were going in the countrie's ſervice for apprehending and bringing to Edinburgh theſe Hylanders that had oppreſſed the Laird of Lawers; and he being called to the bar to anſwer for him ſelfe, awowed it all, and ſaid he had reaſon to doe it, ſince theſe companies were owing 11 or 1200 lb. Scots of arrears in that toun, and he thought they might pay the old, ere they contracted new; and he ſaw the bute of their malice ran againſt the Burrows;—with ſome ſuch impertinent ſtuff, his head being hot with wine. The Councell reſented it; and Halton (who lik't him nather for his reſemblance of, nor dependance on, Kincarden, and for contradicting the affair about the copper money, of which ſee *infra*.) propoſed he might be inſtantly puniſhed. The Advocat alledged a libell ought to be formed firſt, and given to him to anſwer. It was answered very weell, that formality needed not heir, ſince they were all ear witneſſes of what he had ſpoke, and ſo might proceed ſummarly and inſtantly. And ſo they voted him out of his Proveſtrie, declared him incapable of all truſt, and ſent him to priſon: Since, upon this deprivation, another is elected proveſt, and upon bail to re-enter, he is liberat from priſon, eſpecially on a teſtificat bearing his indiſpoſition.<sup>1</sup>

At this ſame tyme, the Secret Councell, at the deſyre of the Royall ib. § 2. Burrows, returned and re-eſtabliſhed the Staple-port of the Scots nation again at Campveer. See the proclamation, and many other papers anent this matter, *apud me*.

The Burrows alſo were præparing ane addreſſe to the Secret Coun- ib. § 3. cell for ordering the coining of more copper money in turners, on this pretence, that it was worne out; which was only to gratify Halton, and could not be legally demanded by a particular Convention of the Burrows; yea, not by the generall, who are only a committee for

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<sup>1</sup> Halton procured, againſt nixt Councell, a letter from his brother approving what they had done againſt Proveſt Milne. However, they released him upon bail.

Trade outward and inward, and no wheir a third estate, but when assembled in Parliament; and the embasing our coin by too much copper money is, and was, one of the greevances in 1673, fitter to be restrained (see my notes on it) than to be supplicat for. See 29·A& in 1449. (Vide *infra*, num. 506.)

A. fol. 264,  
No. 505.

8<sup>mo</sup> *Novembris* 1676.—Abernethie, skipper in Leith, *contra* Cornelius Neilson and Gilbert Fyffe, bailzies their. This Abernethy having committed a ryot in Leith, the bailzies convey'd him before them, and fyn'd him in 100 lb. Scots. Of this decreet the party obtains a suspension, and intimats it. The partie injured by him craves lawborrows of him; the bailzie commanding him to find lawborrows, he refuses, wheiron they put him in prison; he raises criminall letters before the Secret Councell, complaining of wrongous imprisonment; and that they, after intimation of the Lords letters of suspension, had proceeded to incarcerat him for his fyne, tho they ware *functi officio*, and that they did it *spreto mandato judicis superioris*. Answered,—They did not imprison him for the fine, but for refusing to find caution to secure his neibhour of bodily harme. Replied,—Offered to prove it could not be for that, because he was 12 howers in prison, ere lawborrows was sought of him, and then he offered caution, and it was refused. Duplied,—Offered to prove *per* the clerk, officers, and other *membra curiæ*, it was required ere he entred the prison door, and the caution he offered was justly refused, because insufficient. The Councell ordain'd the man to be sett at liberty, he paying in the fine to the Shireff-deputes of Edinburgh, who had also convey'd him before them, and fined him, *quo jure, quave injuria* might not be questioned with Halton, who was Shireff principall; yet in cumulative jurisdictions, such as this was, the first attacher is præferred. And as to the wrongous imprisonment, ordain'd the clerk, officers, and other members of Court to be examined upon the occasion their of; whosse depositions, after fundry dayes attendance, on the Secret Councell being advised, they found the Magiftrats had done no wrong, and theirfor affoilzied them. Bailzie Neilson urg'd to have him censured for murmuring [against the] magistracy, but it was not noticed. He was also of the opinion that he might have pro-



ceeded and decreeted notwithstanding the suspension, since it was raised before he had pronounced sentence, and so related to a *non-ens*, and behoved to raise a new suspension; but it was told him it was not safe. Some think the bailzies of regalities, barronies or brughs royall, and Shireffs, are stinted in their fines for blood to 50 lb Scots.

16 *Novembris* 1676.—*Supra* at number 498, § 3°, we have made mention of a petition was præparing from some of the Burrows, for licence to import forrain gold and silver, and coining more copper money; which, tho cast in in the crampet, yet was the main designe of the bill, and the rest ware but as a sugred pill, to make this glyde over most currently. This day the bill was presented. The first part of it anent Spanish, French, and other forrain species, alledging, amongs other causes of the decay of trade, the not-importation of money is one; and this proposal is the best remedy theirow, needs not be heir fet doune, because we have the proclamation issued furth upon it in print, only they have not printed that part which relates to the licence of stamping turners. On the reading of the bill, fundry of the members of the Secret Councell was ready to applaude it, and desire to have it committed. Sir A[ndrew] Ramfay of Abbotshall craved to see who subscribed the bill. Answered, The Proveft of Edinburgh, as præses of the meeting, in name of the Burrows. He replied,—Thesse gentlemen ware burgeffes, but could not be called the Burrows; for their Convention met but once a year, and hes no power to delegat; and even the generall meeting had no power to medle beyond what was contained in the heads of the missive calling them together, of which coinadge was none. Nixt, he behoved to take the freedome to say, that the first part of the A& anent forraine coins was but to debate on the king of Spain's gold, a thing we would not be much troubled with; And for copper money, he conceaved it could no way be of advantadge to the country, since there was so great a superfætation of it already, that we ware likely to be opprest with it; especially, considering that England, having now made copper money of their own, our turners that went the lenth of Yorkshire, will regorge and turne back; and for our copper moneys influencing and advancing trade, he craved leave to differ, since

A. fol. 264,  
b. No. 506.

trade confisted in export and import, and turners could be used in nather ; That the matter of coining money is one of the greateft concernes, and most important of the kingdome, and hes ever been ouned and asserted by the King and Parliament as such ; and he remembers he hes red ane old A& of King James the 2<sup>d</sup>, (it's the 29 A& in 1449,) discharging to strike money without command of the King under his Great Seall ; and of a later A& of King James the 6<sup>t</sup>, (it's the 17 A& in 1567,) prohibiting any lay'd money to be made without consent of the 3 estates of Parliament. All the answer this got was from Craigie, the Justice-Clerk, That if this particular Convention was not warranted, the nixt generall meeting might authorize what they had done, or else disapprove and censure it. Abotshall replied, that was not enough, the Councell's authority was incroach't upon, who are more proper to consider of coinage then 5 or 6 burgers, who had no power ; for he knew the constitution of a Convention as much as any at the table could, his employments that way having instructed him ; it is one of the maine concernements of the government of the state, and it might have sett thosse gentlemen to have informed, and not to have petitioned his Majesty's Councell to their dutie, &c. Lord Lithgow alledged, Their was a great scarcity of turners in the country, and it was verie necessar the bill should be committed. Abotshall repartied, He knew no penurie in the places he frequented ; and as for committing, he thought such ane affair was not to be hudled up, but to be agitat and debate in full Councell ; for the event of committments was, that the thing ordinarily past upon the trust, credit, and report of the members of the committee, whosse care perones are loath to call in doubt : But since he found so many encline to commit it, and it might be his lot never to have another occasion to argue the affair, and theirfor he behoved to mind them what outcry the black money made in James the 3<sup>d</sup>'s tyme ; what complaints ware against it in 1641, as appears from the 6<sup>t</sup> A& of that Parliament, pag. 79 ; and it may be, it will not be improper that amongs the greevances of the last Parliament 1673, the copper coine was not the leift ;<sup>1</sup> (See the complaint of it sett doune in the

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<sup>1</sup> See the folio manuscript E. 5<sup>to</sup> Martij 1681 anent the crying up the mark peices, pag. 191.

History of that Parliament *apud me*, pag. 65 *et seqq.*) and he hop't the Councell would not countenance any thing of so generall dislike. Halton gave this a very sober returne, and only said, Greevances was not *nomen juris*. Then it was put to the omnipotent wote [vote], and a committee was carried. But in regard Abotshall seemed to understand so perfittly the affair, it was mov'd by one he might be upon it, and one of the fix; which was done; yet they ware feared to call him. Theirafter they had fundrie meetings, yet delayed to make any report till the 27 of Februar 1677, 3 moneths and a halfe theirafter; at which tyme Abotshall pertinently enlarged all the former grounds against it, tho the Earle of Kinghorne was hounded out to borrow the lend [*to give the loan*] of his tongue for that day; but he was not minded to sneak from his compearance. The vote determin'd the controverfy, wheirin Abotshall was left *solus* in the negative; and the ArchBifchop of St Androis<sup>1</sup> was pleased, in face of the Councell, to say, "That bolt was soon shot." This went not without ane answer; for it was boldly told him that proverb was only used for foolls: In his "No" he had serv'd his conscience, and he could not understand how any should be quarrelled for their vote, since all ware free and fworne to give their opinion. The Bifchop would have detorted this, as if he had reflected on him as acting unconscientiously, and thought Halton, for whom he was fighting, should have concerned himselfe in it; but the Councell ware not disposed to espouse quarrells.—And thus ended that heat in Councell, whoffe A& will put above 4000 lb. English of free profit in Halton's pocket; for the pound of copper, which they buy for 16 shiling Scots, will afford them when stamped, 36 or 40 sh., so that they have the one halfe of the other; allowing them besyde 6 pence on each lb. for their pains and workmanship.

*Ultimo Novembris* 1676.—This day the toune of Dundy was conveyed by my Lord Halton before the Secret Councell, for judging a ryot, which only belonged to him, and refusing to keep prisoners for him, &c. con-

A. fol. 267,  
b. No. 511.

<sup>1</sup> The designe of churchmen in judicatories, is mainly, *nequid detrimenti Ecclesia capiat*, like the Roman *Tribuni plebis* for that Republick.

forme to the decret he had got against them: (*Vide supra*, Sept<sup>r</sup> 1676, num. 495.) He got their Provest and Baillies imprisoned in the tolbuith of Edinburgh, and fined the Provest in 4000 mks., and each of the Baillies in 3000 mks.; and the toune of Dundee ordained to find caution of lawborrows, under the paine of 20,000 mks., for Halton and his servands security at the hands of all the inhabitants of Dundy:—Which was thought very strange and hard to bind, for the humors of peepel, who might in a pike to the Magistrats cause them incurre the failzie; and it wants ane ordinar stile. This caused great outcry.

A. fol. 267,  
No. 512.

*Eodem die*.—Strauchan of Glenkindies remission being presented this day in Councell, was stop't and opposed by his Majestie's Advocat, Because it was not past the sealls, no assythment nor letter of flayns; and 2<sup>do</sup>, It boor only remitting of slaughter; wheiras this was a most grosse and infamous murder, with most odious circumstances, whille the poor man was under his power; and so falls under the case of that statutorie treason, mentioned in the Act Parl. 1587, and so will forfeit his lands, and no remission can be given of such. (*Vide alibi*, in my collection of the Occurrents of the Seffion at the 3<sup>d</sup> of Januar 1677, a letter from the King stopping it.) Having made his escape, he was apprehended and incarcerat of new again.

A. fol. 267,  
No. 513.

5<sup>to</sup> *Decembris* 1676.—Fordell Henderfone, as air of tailzie to Monteith of Randifoord, obtain'd at Secret Councell the chartor kift to be given up to him, and Monteith of Carybber to be dispossess and himselfe put in possession; because the beginning of Carybber's possession was precarious, as a factor, and the disposition by which he acclaimed the estate was suspected of falsehood, and improbation of it depending before the Lords of Seffion. It was wondred, how the Councell could find this a competent bufiness for them, it nather being a ryot nor *metus majoris tumultus*, but meerly civill. When the improbation came to be tryed, in Februar 1677, their being only 2 subscriyving witnesses in the disposition, one of them, who had been Randyford's servant, and who was mightily suspected to be bribed, disowned his subscription; which tells us, that frequent error of

taking the subscribers own men servants or sons to be witnesses in the writs granted by them. Mr. Geo. Norvell ever advyſed that writs, eſpecially if of moment, ſhould be ſubſcribed before famous and honeſt witnesses; and yet it's little looked to, which draws many writs in hazard, mean fellows being eaſily corrupted to deny their ſubſcriptions.

*Eodem tempore.*—The members concerned in the Royall Fiſhing Company (of whom ſee *alibi* in my obſerves on the Parliament 1672,) met at this tyme to choiſe manadgers and directors; wher Halton ruled all by getting the King's 50 votes aſſigned to him by the King's letter; his brother and the Dutcheſſe their 10 votes, and his own 2; for every 100 lb. ſterling gives a vote: Now, by thir 62 votes he was the major part, and carried what he liked, for their will not be 62 perſones in the company beſides theſe. This was thought an extraordinary way of doing buſines; only they who have put in moſt ſtock into the ſociety ought in reaſon to have the greateſt ſhare in the governement and adminiſtration of it. By the reſult of the compts, it was found they would get double their annuelrent for the laſt year's venture. A. fol. 267, b.  
No. 514.

*Eodem tempore in Decembris 1676.*—The King wrot a letter to the Lords of Seſſion anent the ſhip called the Calmer, with Sir Lionel Jenkins, one of the Judges of the Admiralty of England, complaining the Lords ſhould have declared that ſhip prize only becauſe ſome few in the ſhip ware Hollanders; which could not, in law, infect the reſt. This was charged upon John Inglis, and he blamed for informing the Suedes reſident and the Colledge of Commerce at Stockholme. The Lords wrot a vindication of themſelves in that affair, and a defence of our cuſtome for not-publication of the teſtimonies of the witnesses wherupon it was adjudged and found prize: tho it was alledged this concealment was only uſed in Courts of æquity in other parts of the world, wher the parties get not leave to heir the witnesses depositions; but in all Courts of law, (ſuch as is the Seſſion,) all the world over, the depositions of the witnesses are patent, and are ſo with us: for their be few parties and their advocats but *vis et* A. fol. 269,  
No. 517, § 11.

*modis* they get a fight of the testimonies. It would seeme this apologie hes not satisfied; for the King, notwithstanding theirow, by his letter in Aprill 1677, hes called for the depositions and haill minutes of that proces to be transmitted to him: and ordains the parties concerned to attend him at Whitehall: and John Cunyghame of Entirken, the King's wryter, raised the fummonds for that effect, being of a new stile, and unheard of before: Which is a most extraordinary act, and astonished all: for, besydes that it may be used as ane argument of our dependence on England, all other proceses may, on misrepresentation, be remanded to Court, and revised and recanvassed their. So it is a fore wipe upon the Lords, as suspect of great injustice, and is by the most knowing perones called 20 tymes worse than Almond's appeal from them to the Parliament, or the Advocates addresse.

But, in the beginning of June 1677, his Majesty being better informed, wryts doune a new letter to the Lords, retracting the former, and declaring the decisions of the Session shall be ultimat and definitive, &c. Yet see the treaty marine betuen our King and the French in February, 1677, article 12: it's hard to make the King contradi&t himselfe in a moneth's tyme.

A. fol. 298,  
No. 627.

27 *Julij* 1677.—The case of the Calmer ship (*de quo vide supra num.* 517, § 11,) being again debate this day, the Lords, of new, adjudged that ship and found it prize: And the President tartly rebuked John Inglis for blowing up the poor strangers, and making them beleve the Lords had done them open and manifest iniquity and injustice, and ather understood not or decerned not conforme to the Law of nations. But, on the 31 of Jully, Jo. Inglis having obtained a new hearing, they sustained this defence, relevant to liberat and free that Calmer ship; that Secretarie Coventrie had a power to fraught the ships ather of enemies, or allies, or neutralls, for his Majestie's service; and that this ship was one which was accordingly so fraughted by him. And upon this knock, in a trace, did the Lords retra& 4 consecutive sentences of their oune finding it prize; and they now declared it free, for it was generally opined to be a free ship. Some thought Lauderdale influenced this change. Their was much debate in this cause from the Law of nations.

A. fol. 319,  
No. 724.

7 *Februarij* 1678.—This day the Lords, of new, advised the affair of

that prize ship called the Calmer; and because of John Inglis, advocat, his passion in this action, anagrammatized the clamor: and found the alledgeance of competent and omitted was *juris positivi* and municipall, and so extended not to strangers; but that the alledgeance of proponed and repelled was *alterius fori*, and touched the soverainety of the Courts, and would meet strangers as weell as others. And to knock the hail businesse on the head by the overruling power of the King's letter, impetrat by the Suedes embassador, and complaining of the Lords procedor in the matter,—for their ware 4 consecutive decreets finding it prize,—they indire&ly reversed all they had done, and took it quite of the fyle, and found it a free ship, unless Souton the master of it should depone upon oath that it belonged to Holland. Now, Souton was clear to depone the contrare; and this did so order the probation, that if Souton had dyed *medio tempore*, the ship would have been simply free.

13 *Decembris* 1676.—Mr. Richard Maitland, minister at Nig, pershues A. fol. 270,  
Sir Jo. Forbes of Monymusk, Meinzie of Pitfodells, &c., his parishioners, No. 523.  
before the Commiffion for Kirks, for ane augmentation of his stipend the lenth of the A& of Parl.; they say the Bischop of Abirdeen had ordered all the ministers in his diocesse whosse stipends ware under 8 chalders of wi&uall to pershue to get them made up. Amongst fundry defences, (which lie in the Information) this was one that Monymusk's teynds could not be affected or burdened with any augmentation, because he had bought his teynds and obtained them on the resignation of the Marquis of Hamilton (who was Lord of erection of the Abbey of Arbroath, to which thir teinds belonged,) in 1618, hæretably disponed to him *cum decimis inclusis*, and theirfor, having so onerously acquired them, they could not be clogged or destined so long as their was other free teinds unbought and not in so favorable a case in the parish. 2<sup>do</sup>, They could not be affected at all, because we offered to prove that the lands of Monymusk, stock and teind, was ane ecclesiasticall fiew of the abbacy of Aberbrothick, (to which religious house they ware vowed by King David, that fair fan& to the croun, when he went against Donald of the Isles, if he should returne prosperous,) who being monks of the Cistercian order, their teynds, both

by the canon law, *cap. 10 et 34, extra de decimis*, and our law, ( . . . . ) are declared free of all burden. If that cloistare ware Cistercians I cannot tell; some say in their foundation they are so called, but in the list I have of all the Monasteries in Scotland, they are called *Turonenses* or *Tironenses, quasi tirones, novitij*. (See Ross's View of all religions.) But if their be no other teynds, it ware hard on this to defraud the church of that which is naturally her patrimony, as the teinds are called, A& 10, Parl. 1567, but if their be any other teynds, they should be free and excemed.

I find now Arbroath was a convent of Benedictin monks, from the chartors of Torrie; see a compend of them. They are called *Turonenses* from the Benedictin abbey of Marmouftier at Tours.

A. fol. 290,  
No. 586.

26 Junij 1677.—In the action pershued before the Commission for the plantation of Kirks, at the instance of Mr. Richard Maitland, minister of Nig, against Monymusk and others, for ane augmentation of his stipend, I alledged it was none of the best characters of a minister to endanger Christian charity and the breach of that spirituall union between him and his flock, for 100 marks more stipend; that augmentations and prorogations ware *correlata*, went *pari passu, uno posito, ponitur et alterum sublato uno tollitur et alterum*; that they ware like thing and it's price, and theirfor, whier prorogation could not take place, nather could ane augmentation, because they could not remunerat nor recompence; but heir no prorogation was præsttable, because they had the heretable and perpetuall right of their teynd,—*ergo*, they could not be burdened with ane augmentation. 2<sup>do</sup>, *Decimæ inclusæ*, by the law of Scotland, have ever been freed from all burden of stipend, because they are not repute to be teinds, but a part of the stock; see Craig, pag. 102, who calls them *decimas garbales*, tho that word also signifies personage teinds; see Stair's Systeme, *titulo* of teynds, § . And, for proving the alledgeance, I produced a chartor granted by the Abbot and Convent of Arbroath in 1544, granting *feudum perpetuum decimarum garbaliū* of the halfe lands of Torrie; (see a summary of the said chartor in another manuscript.) Pitfoddells produced for proving that his teynds ware included also, a chartor both of stock and teynd, whierin his teynds ware expressly designed *decimæ inclusæ*.



Alledged 1<sup>o</sup>, againſt Monymusk's chartor, that it did not prove his teyndſ to be truly *decimæ incluſæ*, which are only ſuch as ware *nunquam antea a ſolo ſeparatæ*, and are preſumed to have been ſewed out before the Councell of Lateran, but Monymusk's ware not ſuch, for in the narrative it was confeſt they had been formerly under tack, *quæ locari prius ſolitæ ſunt*. Nixt, they ware actually ſeparat from the ſtock, in ſo far as he had a ſeparat chartor for them. 3<sup>uo</sup>, They ware not deſigned *incluſæ*, but only *garbales*. 4<sup>uo</sup>, They ware ſeparat, in ſo far as they payed a diſtin& *reddendo* and duety, viz. 28 bolls of wi&tual for them, which was ane evident demonſtration that they had been ſeperatly valued; and their was no other objection againſt Pitfoddell's chartor, *cum decimis incluſis*, for evincing that his teyndſ ware not truly of the nature of theſe *decimæ incluſæ*, to which the law hath given ſuch a ſpeciall priviledge and exemption, but only this laſt: Monymusk's chartor lay open to all the forſaid exceptions.

After many reaſonings, the Commiſſion, on the 25 of Jully 1677, gave him 270 m&ks. of augmentation, and impoſed it all upon Monymusk and Kirkhill, conforme to their rentalls in proces, viz. 250 m&ks. *per annum* on Monymusk, and 30 m&ks. yeirly on Kirkhill, reſerving alwayes to diſcuſſe the point of right before the Judge Ordinar, (*id eſt*, the Lords of Seſſion,) at the diſcuſſing wheirof, if it appear that Pitfoddell's right to his teinds is not truly of the nature of *decimæ incluſæ*, then he is to releive them *pro tanto*, and to bear a proportionall part of the augmentation, conforme to the rentall of his lands in that pariſh, produced in proces. This was a ſtrange and extraordinar reſervation, and reflected extreemly on the knowledge of the members of the Commiſſion, as not of that reach to determine what ware truly *decimæ incluſæ* and what not, as the 15 Lords can. It was the Preſident's cue to ſugillat the Biſchops, and to cut Commiſar Monro, its clerk, ſhort of all the benefit he could; and he ſeimed, in his own opinion, not to be convinced ather that Pitfoddell's chartor did truly containe *decimas incluſas*. It is not uſual to bring decreets of the Commiſſion to be re-canvaſt before the Seſſion, tho this is rather a reference of a hard kernell in law to them that are moſt uſed in breaking them: Yet I remember on

the 27 of Januar 1670, (*vide supra*, num. 111,) Mckeinzie *contra* Mck., Goffuird sustained himselfe judge competent to a reduction of a decreet of the Lords of the Plat for Kirks, tho the Advocat declined it. The truth is, it being a Committee of Parliament, is at leist co-ordinat with the Seffion; see Mck.'s Criminalls, part 2<sup>d</sup>, tit. 3, of the Jurisdiction of the Parliament, pag. 366. Their are no *decimæ inclusæ* with us, but such as ware so posselt and holden and repute before the 29 A& in 1587, annexing all the kirklands to the crown. As for the rights of kirklands granted after March 1558, (because then the Reformation prævailling, churchmen did willfully dilapidate their rents and benefices,) they are null, *ipso jure*, by the 88 A& Parl. 1564, unlesse they ware confirmed by the King, who came in place of the Pope; see Craig, Feud. pag. 108. In prosecution of the forsaidd reservation, Monymusk hes raised his proces of Declarator before the Seffion against Pittfoddells, for bearing a proportionall part of the augmentation, his teyndns not being the priviledged *decimæ inclusæ*. See the 12 of July 1678 (it is pag. 18) wheir it's decided they are not *inclusæ*.

A. fol. 271,  
No. 524.

About this tyme, in December, [Robert] Baillie of Jerefwod, and Androw Stevinson merchand, ware imprisoned and fined in 500 lb. sterling, for aiding the escape of Mr. Kirkton, ane outlawed minister, and brother-in-law to Jerefwod, out of the hands of Captain Carstairs, who was apprehending him, and since is in a great remorse and anguish of spirit for it.

My Lo. Lauderdale, to engratiate himselfe, caused Jerefwod's fyne to be remitted to him in September 1677.

A. fol. 271,  
No. 525.

20 *Decembris* 1676.—This day the three M'Gibbons ware condemned in the Criminall Court to be hang'd, and ware put up in chains betuen Leith and Edinburgh, for robbing the Laird of Lawers in his oune house; he cheated them and cullied them by a forg'd remission, which was scarce *pia fraud*; only it was thought, such robbers and enemies to mankind and humane society deserved to be hunted and caught, as we doe with wild beasts, by netts and all means, *per fas vel nefas*.

4<sup>th</sup> *Januarij* 1677.—Wheir deprædations are made by the Hielanders, A. fol. 272, (for whom the clans are caution,) if intimation be duely made at such and No. 528, § 8. such places by a notar, and instruments, then Major Grant and the heads of the clans are bound to refund the damage; and his pension furth of the Trefurie, for keeping thesse countries peaceable, may be arreifted for the same, tho commonly pensions are not arreftable.

*Eodem tempore*.—The Lords at this time, by their A&, renewed that A. fol. 272, part of the A& of Parliament and regulations about the calling of the No. 529. roll, and what is not brought to ane A& or Decreet to-day, that it be marked and called to-morrow; and in caise the pershuar infist not the 2<sup>d</sup> tyme, then to delet it; and not to be heard again, till it be of new enrolled, and come in behind all that is before it in the book of enrolment: By which rule, if observed, they sweep clean before them. But it was made for the weak Lords; because many pershuars shun'd to infist before them. *Vide* this renewed 1<sup>o</sup> *Novembris* 1677, *numero* 644.

*Eodem tempore*.—Sir Androw Birny and some of the Conformist A. fol. 272, b. Advocats having made ane A&<sup>1</sup> to seclude noblemen and all other No. 530. persones whatsoever from entring unto the Advocats their rounge and walk: much ombrage and discontent was tane theirat, as I have marked in my Session occurrents, 2<sup>d</sup> *Januarij* 1677. The Earles of Dalhouffie, Home, &c., with the Lord Forrester, came one day and required leave to enter, and the keeper refusing, they took instruments in the hands of 2 notars they had brought with them; wheiron they gave in a complaint to the Secret Councell, founded on their peerage, and that they had ever been in possession of it, and that their bufiness might suffer else. The Secret Councell, after some heat, referr'd it to the Session, who called the parties nixt day. Sir G. Mck[einzie] alledged, they ware so crouded with throngs, that it was the liedges interest not to come in, and disturb thosse who ware met there only to doe their bufiness; and

<sup>1</sup> The reason of this Act was, because they drew up only with the late entred Advocats and discountenanced the Conformist ones, for which cause the President, &c., caused make the said Act for excluding them.

that he had seen the E[arle] of Craufurd kept at the door; and that during Sir G. Lockhart's oun government there was ane A& for feclufion of all but Advocats made. Sir G. answer'd, Their was no fuch A& in the Books, nor could be showen. Mckeinzie replied, It was a part of his arbitrary tyranny, if it was not recorded. This, and some other harfh expreffions, Mr. George Bannerman refenting, attended Sir G. Mckeinzie at 12 a cloak that day and gave him a challenge; wheirof the Prefident and some other Lords being informed, they put them both under arreift, and nixt day citing them before them, caufed them find caution to keep the peace, under the pain of 10,000 mks., and proffer'd them a bond to be fubfcrived for that effe&; which Mr. G[eorge] B[an-nerman] refufing, was ordered to prifon, but was only attended by a maiffer till 6 a cloak at night, at which time he engagded.

The Lords fell upon fundry modellis of the Utter-houfe to pleafe the Lords and others; but it was to no purpofe.

A. fol. 272,  
No. 531.

*Eodem tempore.*—Bailzie Charteris about this tyme emprifon'd Mr. Thomas Baird in the Tolbooth of Edinburgh, wheirupon a great complaint was made by the Advocats. See the ftorie of it, and about the priviledges of Advocats, and anent the Toune's officers poinding a filver difh from George Stewart, advocat, for not paying annuity, &c., in my manuscript containing the Occurrents emerging in the Seffion, pag. 4, &c.

A. fol. 273,  
No. 535.

24 *Januarij* 1677.—This day, the cafe of the Tortoise fhip was debate betwixt the King's frigate and a Scots caper: This fhip being firft difcovered by the King's frigate, and fo difenabled by its canon that it could not have efaped,—in come other 2 Dutch fhips to refcue and bring it off; the King's fhip being engagded in difcuffing of them, Captain Ranken, commander of a Scots privateer, comes in upon it's play, and feizes upon the Tortoise, and carries it away. The King's Advocat, &c., raife a Declarator that the fhip belong'd to his Majeftie's frigate, becaufe it having chaffed away the other 2 fhips, nothing could have hindred hir from becoming mafter of the Tortoise, that lay expofed to mercy, unable to refit, unable to flee, unfit to fail.—Alledged for the Scots privateer, that

such things are *primi occupantis* ; that the case is already determined by the Emperor Justinian, in § 13, *Instit. De rerum divifione, et acquirendo rerum dominio*, in the parallell of a wild beaft that one hath wounded fo as it can hardly eafily efcape, and he is in profecution of it, another, nearer hand it than he, firft apprehends it:—Trebatius thought the firft was *dominus* : but the law faves it becomes *ejus qui ceperit, quia multa accidere poffunt ut eum non capiat, multa inter calicem fupremaque labra* ; and the other is only guilty of incivility, and may be fyned theirfor, but the propertie is tranfmitted to the taker. . . . .

The Lords firft before anfwer took tryall if the faid fhip was fo embellifhed that it could not have efaped the man-of-war.

The Lords having advifed the debate on the 15 of February 1677, preferr'd the Scots privateer to the King, to give a demonftration of their æquity that they durft determine againft the King. This was done *valde reclamante Præfide*, for Sir James Stanfield's fake.

About this tyme [25 Januarij 1677], Sir Patrick Nifbet of Dean being A. fol. 274, conven'd before the Criminall Court by the Laird of Humby (Hepburne,) No. 538, § 9. for perjuring himfelfe in 2 contrare oaths, the King's Advocat advyfed his coufin S. Pat. to give Humby 4000 mks. to get a difcharge of the proces, and up the depofitions to be cancelled. Halton getting notice of this collufive tranfaction, to fhew his earneftnes to enrich the fifk, fent notice to the clerk to keep up the depofitions, for he would caufe it to be perfhued; *fecundum fenatus confultum Turpilianum*. The fame being lent up to, (and, as fome fay, deftroyed by) Alexander Nifbet of Craigintinny upon his receipt to redeliver, Halton was fo violent that he caufed imprifon Craigintinny for fundry weeks, till he obtain'd a charge to fet at liberty, with ane oblidge to enter himfelfe the firft of June, if required. Perjurie is not to be præfumed *in re minima et poft aliquid temporis intervallum*, man's memorie being labile. Some advyfed Sir Patrick to raife a præcognition before the Councell, who are ufually favourable to the pannell ; but præcognitions ufe only to be in cafes of flaughter, and not of menfwearing ; for witneffes are onlie tane in præcognitions, wheiras in this perjurie the probation was only by wryt.

A. fol. 275,  
No. 544. 8<sup>th</sup> *Februarij* 1677.—William Hamilton, Deacon Conveiner of the Trades of Edinburgh, got Nicoll Somervell, clerk to the Magdalen Chappell meeting, deprived for malversation and other trinqueting; who, complaining of it at Secret Councell, was their found guilty, fyn'd, and imprisoned. (See the Information of it.)

A. fol. 275,  
No. 540. 15 Februar 1677.—This day Sir Alexander Forbes of Tolquhon was fin'd in Councell in 10,000 mks. for giving Mr. John Strauchan his minifter a cuff, and sent to prison till he pay'd it, as also to pay 500 mks. to the minifter, and 4 dollars to every witneffe who came over. This was only done to pay a bond of the like summe which he had of my Lord Elphinton, who has got a right to the fine.

On the 10 of August 1677, the Secret Councell set him at liberty, upon caution to re-enter when demanded.

A. fol. 275,  
No. 548. 20 *Februarij* 1677.—This day the Earle of Rothes, Chancellor, (Sir W<sup>m</sup> Bruce's name is in the gift of non-entrie,) gain'd his action against my Lord Melvill and his 2<sup>d</sup> sone; the Lords found Melvill's sone could not be served air of tailzie to the last Countes of Leven during the possibility of a 2<sup>d</sup> sone of my Lord Chancelor's body, (for the devill most byde his day,) and præfers Sir W<sup>m</sup> Bruce's gift. Theirafter, on the 26 of Februar, on a bill given in by Melvill, and a debate following theiron, representing that they could not præfer Sir W<sup>m</sup>'s gift, since their was not a *verus contradictor in campo*, without which the proces would be utterly null and void: Melvill was not, for he was no member of the tailzie: his sone was minor, and might say nixt day his father had colluded, and so *res inter alios acta* could not præjudge him. The Chancelor had tane much pains to have out his decret extracted (the 24 howers after the reading in the minut book, and 12 howers after the giving out of the scroll to the adverse party, being past) before this bill came in, but Mr. Alex<sup>r</sup> Gibsone, clerk, with much rudenes and passion refused it; undoubtedly he was authorized so to doe by the President, else one so timorous as he, had not done it. However, the Lords this day take back what they gave; and some of them who ware clear for him the tyme before, as Argyle, &c.,

change on him ; Halton stood firme to him. The Lords resolved to leive a buckle louse for overawing him and keeping him quiet betwixt and June. They reserved alwayes to debate upon the gifts in the special Declarator, (which they minded to intent before the shireffs, wheir the lands lye,) whither it be a non-entry in the king's hands, or if it be lying in *hæreditate jacente*, which is a most ridiculous fancy, their being no *hæreditas jacens* known by the law of Scotland, but in favors of creditors when appearand airs renonces, and their is none in the feudall law, wheir the king most alwayes have a vassel. He was forced to take his decreet with this clog at the tail of it, and extract it with that quality, because they would not give it him otherwayes. They aime at a sequestration of the rents in a second parties hands during the dependance and possibility of a second fone, and Melvill's second fones exclusion. . . . .

On the Chancellor's interlocutor their was a roundell made :

Ens Reale (*id est* Melvill's 2<sup>d</sup> fone) craves to be præferr'd ;

Ad quantum et ad quale, Ens Reale.

But I (*id est* the Chancellor) say Nihil tale

Until I be interr'd

Ens Reale craves for to be serv'd.

As to the originall of tailzies in Scotland, with clauses irritant incaise of contracting of debts, or not taking the name, &c., they are very late, the first of them are within thesse 60 or 70 years : what was first in Scotland was the laird of Calderwood's tailzie of his lands, adviced by Sir Thomas Hope, then their was on Duncan's, then their was Thomas Moodie's, as to the lands of Saughtonhall, and then the Wicount of Stormont's, as to the estate of Annandale, and many since, tho the President in his systeme hes declared himselfe no friend to such clauses. In the tailzie of the Dukedome of Hamilton it's provided, that all the succeffors shall be of the Protestant religion ; and if they forsake, then, by ane irritant clause, the estate shall devolve and deschend to the nixt in blood : it likewayes bears, that none of them shall ever bear armes against the King or his authority, but shall ever assist him in all his wars, under

omission of the few. *Queritur*, if thir clausfes ware insert by themselves or the King? I hear of rare clausfes insert in Ro. Macgill, Lord Foord, his chartors of resignation, bearing a legend of his life. See some of his wrytings and colle&ions, *apud me*.

A. fol. 277,  
No. 550, § 4. 23 Feb. 1677.—The Lady Marquis of Dowglas obtained at Secret Councell modified to hir 2000 mks., for aliment till the first of June, since shee did not cohabit with hir Lord, in respect of some differences betuixt them. About the same tyme, one Isobell Haddoway gave in a bill to the Lords of Session against Maccubi, merchand in Edinburgh, hir husband, complaining that he kept not his oun house, and yet gave hir no competency to live upon, &c. The Lords ordained him to be cited by a maiffer, and referred it to Castlehill to hear them; who agreed them together.

A. fol. 277,  
No. 550, § 5. This Winter, at the toun of Abernethy, happened ane accident that gave much occasion of talk; viz. a fletcher being drinking their with ane other countrie man in ane alehouse, and falling at wariance, the fletcher sticked the other. Their ware some neibhouring gentlemen drinking in the nixt rounge, who upon the noice being invited to enter, took him in the very act; and, being astonish't with the cruelty and warm'd with drink, they make themselves the immediate avengers of the blood, and leads him out to the regality gallows, and causes hang him theiron, albeit they ware nather shirefs, bailzies of regaltie, nor wested with any other publi& capacity, but the notoriety of the fact, and zeall, did burne them up. *Queritur*,—Seing this was ane act of materiall justice if the omission of pun&ilios of forme, of exercising and usurping and assuming the sword of the magistrat in a clear case be a punishable cryme? Yet I find Ludovicus Pontanus, *de urbe Roma singulari* 747, assert that *occidens illum qui jure erat occidendus tamen capitaliter punitur, v. g.* to kill one that's going to the place of execution.

A. fol. 277,  
No. 550, § 6. About this same tyme, we had a relation about the Captain of Clan-ronnald's ladie, a coufin to the Earle of Seaforth, that being Roman Catholic, and finding hirselle indisposed, shee desyred one Pere Whyte



might be sent for from Invernes to confesse hir; which hir husband, tho Protestant, assented to. This father, after some stay, prævailld so far that he had debauch't hir, and the Captain, having one day gone to hunting and returning suddenly to bring something he had forgot, surprized them together in some unchast posture; wheiron he immediatly caused lead out the Priest to his utter gate, and hing him over it, and sent hir some dayes journey into the Hylands, with expresse inhibition not to returne. Mck. in his Plaidoiez, pag. 196, affirms that the Roman law allows to kill a wife taken in the act of adulterie; but see the restrictions of it *in margine*. *Justum dolorem temperare difficile est*.

All this Winter, and in 1677, we were alarum'd with strange passages anent the west-countrie Witches, befyde Pollock's (Maxwell's) house, whom they rosted by a lent fyre,<sup>1</sup> with images of wax and clay formed by the devill, and who at last dyed of that sweiting sicknes. See the depositions and confessions of these Witches in a paper befyde me.<sup>2</sup>

A. fol. 277,  
b. No. 551.

But what struck all with admiration was the manner of the discoverie, by a dumb girle scarce 13, who led them wheir the pictures were, who heard and understood, not only Scots, but all other languages, and answered by signes and appositly; who prævaricated as to hir name (Jonet Douglas) and place of birth, so that none could know whence shee came; who at length spake, and told, shee had all the things shee knew revealed to hir in hir sleep by vision; and that it could not be from any delusion of Satan, for else his kingdome should be devided against it's selfe, and our Saviour's argu-

<sup>1</sup> See the story of Duffus, King of Scots, so rosted, in Buchanan, pag. 184.

<sup>2</sup> The probation of no crime is more obscure and difficult, and more removed from the apprehension of our sense and understanding, then this of witchcraft. (See the treatise besyde me against the common received tenents of witchcraft. See Mck.'s plaidings for *Mævia* accused of witchcraft, pag. 185 and 196, *et seq.*) For the matter of spirits being so dark, being invisible, since *nihil est in intellectu quod non prius fuit in sensu*, and that our very soull, a spirituall substance, has no reflex act upon it selfe, and we know not what it is; what can we be assured of these apparitions of spirits, witches, and of the improbable and impossible things they doe, to be other then the reveries of a disturbed brain, extorted oft tymes? and many innocent persons have suffered in this point of conjecture and divination.

ment should not be concluding. But what made hir very suspect to be hanted only by a familiar, was hir dissolute idle life, having nothing of austeritv, and not so much as a shew or semblance of piety in it, but much lightnes and vanity, so that many concluded hir to be a very cheat : And accordingly the Secret Councill isshued furth a warrand, in May 1677, to apprehend hir wheirever shee should be found, in Glasgow or Paislay, &c., and put hir in cloffe prison : for if hir knowledge be so strange as it's reported to be, it's just shee tell whence shee hes it ; but if it be a unvoluntar possession, or by a spirit's frequenting of hir, or by the second sight without a paction, it can never be made criminall : it's her misfortune, to be prayed and fasted against, but not her guilt, no more than ane infant or madman are punished ; *nam satis ipso furore punitur*, sayes the law.<sup>1</sup>

John Stewart's sifter, the maid witch amongs them, about the age of 14, albeit penitent and confessing, yet, throw pity, was, by order from the Secret Councill, reprieved from burning.

Nather mozt the West alone be fertile in witches, but Haddington, in Eist Louthian, mozt also give harbor to such unhappie creatures. Their is one Margaret Kirkwood in Haddington that hangs hir selfe ; some say shee was so strangled by the devill and witches. The same happened in

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<sup>1</sup> In June 1677, the Secret Councill caused bring in the dumb lassie, now speaking, calling hir selfe Jonet Douglas, (but shee lyed as to hir parentage,) to the Canogate Tolbuith, whair I spoke with hir. Ere shee came from the West, shee had discovered 5 or 6 mo witches, who had made the picturo of Hamilton of Barnes, and wheirof he dyed : They ware burnt at Dumbarton. (See it *infra*, numero 573.) The first night shee came to the Canogate, C. Charteris, one of the tounie bailies, shee told him his wife was witch't by 2 old weemen in the Castle Hill, and condescended on them, and they ware imprisoned, and denied. Shee desired them to repeat the Lord's Prayer : They did, before 2 ministers and others, who observed no alteration ; the lassie bad them advert, for they said not "Our Father which art in Heaven," *in presenti* ; but "which wart," applying it to Satan ; by the same rule, they should turne the following, "thy will be done," from "as it is," to "as it was in Heaven," which I know not if they did : but this is very incredible and fallacious. All ran to hir, till the Councill discharged any to have accesse, finding her ane impostor and cheat, at leist possess, or having the 2<sup>d</sup> sight, or revealed to hir in the air, (as was reported of Major Weir, see it *alibi*,) or in hir sleep. The Councill ordained hir to be banish't the King's dominions, and transported in some ship. But their is no master can be yet persuaded to take hir with them, they are so fear'd ; and some choice rather to hazard away without a passe as to goe in such bad company, as they think.

a Sunday in the forenoon;—she has a serving woman in the church, called Elifabeth Moodie, who makes some disturbance and noice during the sermon, and numbers till shee reach 59, which was hir mistresses age, and then cryes the “turne was done;” which was found to be the very instant in which hir mistresse was making away hir selfe. Upon this, being apprehended and examined, shee denied till shee was searched and pricked; and, after the alledged marques were found upon hir, shee confessed hir selfe to be a witch, and the particular circumstances of it, as I heard hir acknowledge them. She was burnt for it in the beginning of June 1677. The said Margaret Kirkwood, who hang’d hir selfe, being wealthie, their ware severalls who put in for the gift of hir escheat; amongs others the Toune of Hadington, not only upon the account that they ware shireffs within them selves, (which I think is not enough to give them right to the escheats of such as put violent hands in their oun life within their bounds, else the Toune of Edinburgh should have it, who, by ane old priviledge and clause in their chartors had right to the escheats of all who committed slaughter within their brugh, but ware forced to quite it in their chartor 1636;) but because the toune of Hadington hes a particular clause in their chartor of erection exeiming them from the shireff’s jurisdiction, by which they are in the present use and possession of repleding their burgeses from the shireff. And those who have read the toune of Dumbar’s chartor, procured to them from K. James the 6<sup>t</sup> by Sir George Home, Earle of Dumbar, say it bears a farder clause, viz. *inhibemus omnibus judicibus nostris eos quovis modo molestare*,—none of which would be sufficient to give them right to the escheat goods of the said woman, *quæ mortem sibi conscivit*, (for Edinburgh pretends not the gift and priviledge as to such escheats,) but they affirme the chartor of Hadington has a farder clause in it, viz. with power to the magistrates theirow to judge *de furto aliisque criminibus*, (under which they would draw *felo de se*,) *et æschatum pro ijs capiendi et ad proprios suos usus convertendi*; and theirfor they thought it a quæstioning their right, to seek the gift of it from the Exchequer.

That miserable bodie Lisie Mudie, who confest hir selfe to be a witch, did also delate 5 other weemen in the toune of Hadington, (two of them

midwives,) and a man, as guilty of the same willanie; and, being confronted with them, I saw hir constantly (tho some, without any ground, alledged there was hypocondriack,) abide at hir delation, and bind them with particular tokens and circumstances, but they denied all. I did see the man's bodie searh't and prick't in 2 sundrie places, one at the ribs, and the other in his shoulder; he seem'd to find pain, but no blood followed, tho the pins were the lenth of one's finger, and one of them was thrust in to the head: the marks ware blewish, very small, and had no protuberancy above the skin.<sup>1</sup>

I remained very unclear and dissatisfied with this way of triall, as most fallacious; and the fellow could give me no accompt of the principles of his art, but seemed to be a drunken foolish rogue. I find no judicious lawyer laying anie weight upon this marque, (which they call *Sagaram stigma*,) farder then *levis conjectura et præsumptio, unde procedi potest ad inquisitionem; ad torturam vero non*; (and their is no doubt but their methods of keeping them from sleep, and pricking, are a torture *in suo genere*, which no Judge can inflict but the Secret Councell and Criminall Lords.) See Martinus *del Rio Disquisitionum magicarum, libro 2, in quaestione 21, pag. 198*, where he sayes, in those marks there is nather pain nor blood; again, *libro 5<sup>to</sup>, sectione 4<sup>ta</sup>, pag. 726*, he shows the severall figures of it; and that he gives not the nip to witches of quality; and sometymes when they are apprehended he delets it, and that it will be in their eye brows, their mouth, their nostrills, and in weemens privities, and that all these marks are not void of pains, and when they find them selves prick't they may easily feigne paine that they find not. *De purgatione seu proba per aquam*, see him refute it largely, pag. . The most part of the creatures that are thus deluded, by this grand impostor and ennemy of mankind, are of the meanest rank, and are ather seduced by malice, poverty, ignorance, or covetousnes: and it's the unspeakable mercy and providence of our good God, that that poor devill hes

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<sup>1</sup> The pricker said there were 3 sorts of witches marks: the horne mark, it was very hard; the breist mark, it was litle; and the feeling mark, in which they had sence and paine. See McKeinsie's Criminals, pag. 91. *Vide* September 1678, in another manuscript, pag. 21, *et seqq.* about witches pannelled then and the pricker put in prison.

not the command of money, (tho we say he is master of all the mines and hid treasures in the earth,) else he would debauch the greatest part of the world. (See *Delrio ubi supra*, libro 2, *quest.* 12, *pag.* 149.)

24 *Februarij* 1677.—The Secret Councell, by their A& founded on a letter from the King, (see the A& of Councell,) divided Scotland in 3 districts, as to the granting of passes to all ships going abroad; which was a considerable part of the office and profit essentially annex'd to the Judge Admirall and his clerk, and yet most be disjoyn'd, because Mr. Hew Dalrymple, the President's 3<sup>d</sup> sone, was to be sharer of the benefit. The first was to the toun of Edinburgh, for all the sea ports betuen the Mule of Galloway and Abirdeen; the 2<sup>d</sup> from Abirdeen to Orkney; the 3<sup>d</sup> for Orkney and Shetland. . . . See this annulled, 6<sup>to</sup> May 1680, in another Manuscript, page 143.

*Eodem tempore*.—The Shireff's fiars are mainly sett for this designe, to regulate the prices of undelivered bolls by the tennent to their master, to make them liable in that price. Yet some masters doe, by A& of Court, bind their tennents in payment of hyer prices than the fiars, in caise of failzie of delivery, as 20 shilling more *nomine pænæ*. The Exchequer fialls are sett for the King's waffals who pay in their fewdueties to them as the King's commissiioners, (and if it be within x<sup>th</sup>, to the Shireff,) by the regulations of Exchequer made in 1672: their prices are usually set very easie; just as the toun of Edinburgh commonly dealls with their waffalls. This year, 1677, the wheat payed into the Exchequer is estimat to 5 lb. the boll, the bear to 4 lb., and the oats to 3.

1 *Martij* 1677.—Trotter, Lady Craigleith, was fined at Secret Counsell in 6000 mks. for conveying away hir daughter, aireffe of Craigleith, after the Councell had ordain'd hir to be sequestrat in the Bishop of Edinburgh's house, and sending hir to Berwick, whier shee married young Prestongrange, (Morison,) and stayed some 2 or 3 moneths, till shee compleited hir 12 years of age, after which the marriage could not be dissolved, nor shee refile. *Pietas materna et naturalis* might have said

much to have defended the mother in what shee did: But what made it a guilt was, that Mr. James Rochied being hir uncle, had offered hir to Halton's 2<sup>d</sup> or 3<sup>d</sup> sone. Hir maternall unckle, Mortonhall, was fyn'd for his acceffion in 3000 mks., and young Prestongrange in 1000 merks, being the mul& imposed upon such of his quality by the [34th] A& of Parliament 1661, against clandestine marriages. Many observed the concurrence of this hard sentence of 10,000 mks. amongs them, and sending them to prison till it should be payed, with Mr. James Rocheid's daughter hir running away this same night with Francis Cathcart.

Fol. 279,  
No. 557.

*Eodem die.*—Alexander Milne, late Proveft of Lithgow, was imprison'd by the Councell's orders, and fyned in 500 mks., for committing a ryot in poinding on a decreet or bond after a past suspension was intimat to him.

Fol. 279, b.  
No. 558.

6<sup>to</sup> *Martij* 1677.—James Campbell, Proveft, and the rest of the Magiftrats of Glasgou, ware fyn'd by the Secret Councell in 10,000 mks., for suffering 2 conventiculars, who ware imprisoned in the tolbooth, to escape, albeit they showed how the Jaylor's wife was bled and strucken in resisting them, since their prison should have been better kept, and more securely, than by a woman. They reserved alwayes releiff to the Toune of Glasgou against the parties, who ware responfall enough. This was 30,000 mks. in 2 moneths space for 3 fynes, Tolquhon's, Craigleith's, and this. They say my Lord Roffe got the gift of Glasgou's fine, and compon'd it. Mr. James Rocheid got 9000 mks. of his good-fifter and hir brother's fyne; and my Lord Elphinston got that of Tolquhon's, being his debtor in 6000 mks. before; so the King's Exchequer was litle enriched, with much outcry against the Councell.

A. fol. 279,  
No. 559.

*Eodem tempore.*—He who assumed the title of Earle of Caithness, as neirest contingent in blood, was, by a proclamation, inhibited to take the said stile, or the lidges to give it him, on this pretence, that both the estate, honor, and dignity ware resigned in the King's hands in the last Earle's tyme. And tho some doubt of the resigning of honors, yet Sir

George Lockhart thinks a man may, in prejudice of his airs, resign the very title, and surrender and abandon it, *ad perpetuam remanentiam*, in the King's hands, which will extinguish it, and consolidate it with the fountain of honor: for our feuds are *feuda conditionata*, not the *feuda gentilitia ex pacto et providentia* mentioned in the feudall law, where a man could not resign or abandon the fee without the advice and consent *proximorum agnatorum*; and if he had done it, they had *jus retractus* within such a time; (see Craig *de jure proxime*.) With us a man in *liedje poustie* may prejudice his airs, and give it to strangers; unless it be in waird lands, in the alienation of more than the halfe whereof he must have the superior's consent, tho not his kinsfolks: And by this same rule, Borrows royall have resigned their freedom and privilege in Parliament, and so expunged the Rolls: tho it seems their Magistrats, Commissioner, or other representative, hath less free administration of the town's freedom, than a man has of his own title; yet I have seen it done in Cromarty, Enstruther Wester, &c. On the other hand, one may think it hard to hinder the nearest air-male to take the title, it having been originally given to that man and his airs, and nothing should deprive him of this his birthright, but a crime that taints the blood. And so this Lord Kenmuir being a cousin, and the nearest to the last Lord, took the title and place, without so much as cognoscing himselfe to be the nearest contingent in blood, (which is sometimes done, and makes no passive title,) and yet none quarrells him: It's true to serve and return himselfe air would bind all the debts on him; and it's a pity that the taking the title and place should not infer a gift; it has been attempted; it would make fewer nobles, but the same behoov'd to extend also to gentlemen, and burgesses taking their father's title, or entering burges by him. They say Somervell of Drum minds to assume the title of Lord Somervell, as being the nearest; (see Dury 1633, Sir Ja. Douglas of Mordington *contra* the Lord Oliphant.)

In September 1677, Campbell<sup>1</sup> of Glenurchie was created Earle of Caithness; and that gentleman who is nearest in blood has raised a reduction against him of his right to the said title. The nearest agnate's reason of reduction is, that Glenurchie claims the title and dignity upon the last

Earle's resignation in the King's hands. Now, the laft Earle's right, by which he bruiked the title, was not as air ferved and retoured, but as a fingular fucceffor, who had bought in a comprifing. Now the title of Earle nather was, nor could be compryfed; and fo his resignation (tho he was neareft in blood) could not convey this title; and the perfhuar being ferved air to a former Earle, he hes the only right to the title. This is fomewhat fubtil.

Fol. 280,  
No. 561.

3<sup>do</sup> *Aprilis* 1677.—Cornelius Neilfon, bailzie of Leith, got a reprimande at Secret Councell, being perfhued for wrongous imprifonment by one Murray, a merchand in Leith, whom the Marquis of Atholl ouned, and whom B. Neilfon had put in prifon, becaufe he had with fome freedome differed from him about the matter of a legacy, left by a woman cled with a husband, to the kirk feffion of Leith. He was fet at liberty.

Fol. 280,  
No. 562.

4<sup>to</sup> *Maij* 1677.—Andrew Young, wryter to the fignet, was by his Majeftie's Privy Councell imprifoned for a night, for keeping up a paper from my Lord Dalhouffie, granted to his father, albeit ther was ane accompt owing to A. Young for writings; which is thought by the Lords of Seffion to be a good ground of retention, as having a tacit hypotheque. The King's Advocat was much offended at the fummarnesse of the procedor.

A. fol. 280,  
No. 563.

8<sup>vo</sup> *Maij* 1677.—The Bifhop of Edinburgh, upon the representation of the minifter of Prestonhauch, iffued forth a commiffion to the minifters of that prefbytery, to make a vifitation of the condition of the faid church and yard-dike, it being ruinous; to the effe& they might conveene tradefmen, and examine them upon oath, what truely it would take to repair it; and then to impofe the fame by the common ftent-roll of paying their other ceffes and taxations, conform to their refpectiv rents and interefts in the parifh, upon the gentlemen and heritors parifhioners. At the meeting, a vifible neceffity was feen for repairing; but the method præfcribed in the commiffion was thought only to be fubfidiary, in cafe the heritors could not agree amongft themfelves; for tradefmen will be ready to value high,



on hopes to get the work to themselves ; and, therefore others should be employed besides them who value it.

It was alleged,—The parson by the law was bound to uphold the quire. It was answered,—That holds only when they are in possession of the teynds.—Then alleged,—Some of the most considerable heritors wanted a convenient seat, as, particularly Waughton, whose aisle was remote from the pulpit, and therefore no repairing. Alleged,—If by this delay the winter came on, it would make the reparation much dearer, and therefore the one needed not stop the other.

It was recommended to the heritors to meet amongst themselves, to call for workmen, and settle as easy as they could, for repairing the kirk, and to stint themselves; as also, to accommodate all with seats, and give every one a proportion of the church, less or more, conform to his interest and land in the parish. In some places, they declare all the rouse and seats in the church vacant, and then divide.

29 Maij 1677.—This being the day both of his Majesty's birth and happy A. fol. 280,  
Restoration, the Magistrats of Edinburgh, thinking thereby to gain the b. No. 564.  
reputation of loyalty, and to make a parade and muster during the tyme of their administration, resolved to make a solemne and publick weapon-shawing of the merchand and trades youths, casten in 2 companies, and of the Train'd bands of the toune, consisting of 16 companies. But being reminded what disturbance the like shew did make *in anno* 1666, wheirin a young man was killed, and that by the space of xi years it had been most justly refused, for fear of the like disturbance, and that it was but a needlesse solemnity, accompanied with much danger, and which did put the burgers and youths of the toune to great and superfluous expense ; it being known that 5000 lb. sterling did not defray the cost of their apparell the last muster day ; as also, did so fill the prentices and servants heads with vain toys, that for a moneth or two after they returned not unto joynt, or could not apply their mind to their service again as they were wont to doe, &c. Thir sober counsellors could not prevail with the Magistrats to cause them lay of altogether the designe of the weapon-shawing ; only they, for obviating any interfairing and justling betuixt the mer-

chands and trades, for their place or order in marching, did, by A& of Toune Councell, proclaimed by touck of drum, declare that this 29 of May, the merchand youths should only make ane appearance, and discharging any of the trades to muster at this tyme, and promising to bring them furth the nixt year, or when the Magistrats should see it fitt. This, which was designed to quash any contention or uproar, prov'd the very mean of it; for the trades, being generally discontent that they should be restrained, and the merchands be permitted, began to murmur; and by their masters privy instigation, the prentices, journeymen, and servants, began openly to tell they would muster too, whither the Magistrats will or not, unlesse the merchand youths be discharged as weell as they; in which case, if the Magistrats appoint no weapon-shawing that day at all, they are content. The Magistrats, not regarding their grudges, ordaines the merchand youths to draw out themselves on the 20 or 21 of May, and to muster and discipline themselves against the 29; and named Campbell, sone to the laird of Cefnock, for their captaine, William Bailzie for lieutenant, and John Falconer for ensigneer;—and they having accordingly mustered on that day, the trades became enraged theirat, and some of them, to the number of fourscore or 100, especially of the wrights, maiffons, fletchers, and blacksmiths men, came up with cudgells in their hands from the Cannogate, wher they had been drinking and consulting, thorow all the Hy Street of Edinburgh till they ware at the Castlehill, about 8 a'clock at night, threatning and boasting any of the merchand youths, if they durst come out and fight them. Befyde the drink that had warmed their blood, the weemen prov'd desperat boutefeux and encouradgers of them, crying out to them, “God bleffe the trades! we cannot live without them; carry yourselves like brave lades. When their is fyre, or any other thing ado in the toune, it's they who do it; the merchands come ruffling in their ribbans, and may weell hinder: we can live weell enough without the merchands but not without the trades: And what neids all this pride and distinction? The trades are as honest men's sones as they; and he that sells a two-penny horne is a merchand, forsuith; and he that sells old shoon,” &c. The Magistrats being advertish't of this uproar, sent for a part of the guard, and met them in the coming doune the way at the

Land-marcat, and fell upon them. They refifted fiercely, payed no respect to the Magiftrats, but did beat again.<sup>1</sup> At laft, after ane hower's difpute and more, they ware all diffipat; fome of them wounded, others foundly beaten, and 5 or 6 of them put in prifon. This but raifed and inflamed their choler. The nixt day, when the drummers ware going throw the toune, intimating that no tradesmen fhould meet in knots and companies, they fell upon one of them, and broke his drum; and the nixt day, in the afternoon, they met in the King's Park of Halirudhoufe, to the number of 1500 or 2000,—for the country flocked to them. The Toune Councell being ftraitned how to deport, fent two of their Bailzies, viz. Boid and Charteris, to mollify them with foft words: but many judged this a rafh attempt in Magiftrats, to goe without their ounie jurifdiction, whair they ware no more but private perfones, without command, efpecially having to doe with ane exaſperat rable; but it may be it was called a miſtake from the unprosperous events. They ware glad of the prize: they preſently feize on the two Magiftrats, make them prifoners, and thruſt them unto a litle lodge neir the Eccho; and fall a capitulating, and demand insolent and impertinent things, as is uſual in a confuſed multitude without leaders, *ubi tot capita, tot ſententiæ*: only their was one Moffet, a fletcher, a debauch't, cruell, ill-nurter'd fellow, that appeared moſt aſtive, and aſſumed a kind of regiment and ſuperiority over the reſt. They require the Magiftrats to ſubſcribe a paper they cauſe draw, oblidging themſelves never to quarrell them for what they had done, and that the Trades ſhall muſter at the weapon-ſhawing, as weell as the Merchands. Moffet, not pleiſed with the draught, took it moſt rudely and tore it, and cauſed draw another, and the two Bailzies ſigne it; and leiſt it ſhould be pretended they did it in captivity, they bring them out of the timber lodge, and cauſe them doe it in the feilds; and cauſes them ſwear they ſhall never come in the contrare of what they had done, and ſhould cauſe the other Magiftrats ratify it. And as they are conveying them away, and neir the Park dyke, up comes another ſquadron, and violently hails them back to the

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<sup>1</sup> [Interlined.]—They gave Robert Johnſtoun, Toune Major, ſome ſore wounds in his head, and they ſpared not to beat the Magiſtrats.

place whence they came ; and there they begin with new overtures, and propose that the two Bailzies may send in to the Magistrats in the toune, and cause sett at liberty their 6 prisoners, and get ane obligation under their hand, that they should never question them for this mutinie ; and that the Bailzies behooved to stay till the liberation of their comorads, and the obligation were returned back : thus, by the space of 3 or 4 howers, did they detain the Bailzies captives. One of their deacons carried in the message, and, to humour them, the persones were set at freedome, and the bond subscribed. Only Colinton and my Lord Lithgow, as Secret Councillors, with the advice of Provest Binny, Sir George Mckeinzie, and Mr. James Rocheid, deliberat, and send for Major William Cockburne, sous-lieutenant of the King's troupe, and commands him furth with a party of 30 horse of the guard, to charge them ; with injunctions to shoot at a distance, and over their heads, and not to kill or hurt any of them, but in case of absolut necessity. When they saw them coming, they ran to their heels ; yet there was one or two of them mortally wounded, and dyed of their hurts. A woman sitting on the dyke, and crying to the Trades to stand, for there was nothing but powder in their carabines, one of the guard told hir, he should let hir see the contrare, and shot at hir, and the bullet went throw both hir legs, and shee fell of the wall, and it was said shee dyed some dayes after. Thus, about 7 at night they ware dissipat, and Moffet and some 2 or 3 of them ware taken and laid up in the Cannogate tolbooth.

This allarm'd all the country, and the Magistrats sent over notice of it to Lesly, to my Lord Chancellor. He declared, he should be over on Thursday the 24 of May, and hold ane extraordinary Councell, to see to the peace and fuirty of the good toune. But the Trades did not give over their boasts, and their verie masters and deacons, who fomented them under hand, told, there would be yet worse, if the Magistrats did not condescend to let the Trades youths goe out on the 29 of May, as weell as the Merchands ; and if that ware granted, they should perill their lives and fortunes if the leift croce accident happened : wheirupon the Magistrats being frighted, complied so far with their insolencies, and in a manner justified and approved them, that they pittifully past from all their former acts and proclama-

tions, and consented the Trades youths should muster likeways; which was look't upon by some for no act of moderation but of fear: they made not so much as a distinction or seclusion of such as had been instrumentall and ringleaders, either in the first night's uproar, or in the second dayes tumultuary convocation in the Park; tho fundrie of them ware weill enough knowen by the blae marks and stroaks they had got on their face; others reputed it as ane affront to the S[ecret] Councell, they having desired the Councell to interpose, and help them to quash and suppress the growing mutiny, and yet anticipated their judgement, and condescended to let the Trades, who ware guilty of the mutiny, appear, and give them the very thing they ware extorting by sedition from them; so that the Secret Councell ware left as cyphers, the Magistrats having already determin'd the point wheiron they ware to meet, viz., Whither their should be a Weapon-shawing or not; 2<sup>do</sup>, If one ware yeilded to, then, If the Trades should be complemented and permitted to rendezvouz as weell as the innocent part of the toune. At the Councell, the Marquis of Atholl, Sir John Nisbet, then King's Advocat, and Abbotshall, ware of opinion that it should be prohibit altogether; and to please the bairnes with ratlers, it was not fit to endanger the peace of the capitall city; and that the designe of a weapon-shawing was most unnecessar, might doe mischeiff, could doe no good. The Magistrats, knowing that to discharge it was a dounright reflection on their conduct, and prudence, and contrivance, delt with great earnestnesse with my Lord Chancelor and other members, (whom they treated and feasted), to give way to it, and offer'd to engage their wholle estate if their should be the leist disorder committed, and brought many of the youths themselves to plead for it; and the 14 Deacons engaged themselves for their Trades. But this was not security enough, every master should have bound caution for his servants and journeymen's good and peaceable deportment under a fine, as the clans in the Hylands are bound for all under them. Whowever, the Secret Councell accepted of this as sufficient and reasonable; and declared, if any disorder occurred, the Toune should be liable. The Magistrats took it ill that Abbotshall should have been for discharging it to goe on; for they understood it as if he only aimed to baffle them in it, tho it

was indeed *tutius* to have followed his advice : however, there was no small heat and debate at Secret Councell about it. The Towne's magistrats having obtain'd their licence ratified at Secret Councell, and having pocketed up the intollerable affront and injury was done to their government and magistracy, and tho all the sober part of the town desired it might be forborne, since it look't so cloudy, yet they will have it throw ; and so they meet in Towne Councell, and laid doune the method of their marching ; and the Trades, under many of their hands, renounced that pretended privilege, which was the originall and ryse of that tumult at the Weapon-shawing in 1666, of coming into the town before the merchant youths, tho they marched out after them ; for the truth is, as the thing were unreasonable in it selfe, so they never had any such privilege. For, since the time that weapon-shawings were first established and introduced in Edinburgh, (which was in 1626,) they both marched out last, and came in last. And I find, from the Councell Books of Edinburgh, that before Aprill 1626, all the merchants and trades youths were in one company promiscuously, without distinction ; and this is the overture the tradesmen propose yet, that they may be cast into so many companies, and the sequal halfe to be trades captains, and to have merchant lieutenants, and the other halfe merchant captains and trades lieutenants, without distinction, as is in the 16 companies of the townesmen who are married ; and so all markes of separation and all animosities may be buried, and the two great poles of Edinburgh, wheiron it roulls, the merchants and trades may amicably cement, incorporat, and unite, one with another, as it becomes bretheren and fellow-citizens to doe. But in May and October 1626 I find them, by act of Towne Councell, casten unto two companies, the merchant youths in one, and to march on the head of all the companies, next to the Magistrats, and the crafts company in the rear ; and ordaines ilk master to be answerable for his prentice, ilk father for his sonne, ilk deacon for their craft ; and so have the merchant youths ever possesse the van, both out and in, ever since. I find by the same books, in 1625, the townesmen also divided unto 8 companies, 200 men in each company, that's 1600 ; now there is 16 companies, 100 men in each : the narrative of that act largely deduces the great probabilities there was of wars, &c. It is true,

the Trades are by far the more numerous, and they have a great share in the government of the burgh, they having 18 votes in Councell, for the Merchants 20 ; and their rescuing King James in 1596, in that tumult of the 17 of December, has raised their pride ever since ; yet in all democracies in the world that are well ordered, the merchant estate are ever more privileged ; and as all tumults, so did this, serve to clear the controversy, and to deprive them of that which they had been long acclaiming, as rebellion usually raises the sovereignty.

As for the solemnity with which it [the Weapon-shawing] was performed, I need say nothing, in regard the Magistrates took care to print all the particularities of it in the London Gazette, reprinted here at Edinburgh, wherein many things were advanced a little beyond what was true. All I shall say is only this : it was a great oversight to permit any of these that were incendiaries in the commotions, to appear and muster that day, and yet there was not one purged out. There wanted not appearances of disturbance ; for there were some Hotspurs among the crafts that proposed, when they were marching through the Long-Gate, that they should enter straight at Leith-wynd Port, and prevent the merchants ; which infallibly would have ended in blood, if it [had] not been prevented by closing the Port, and speaking them smoothly. Again, when the merchant youths were disbanded and retired, and their colours lodged, and the Towne Trained-bands, that stood betwixt them, and they were desired to do the like, they utterly refused, till they had marched up the street, and shewn themselves as well as the merchant youths had done ; for when they were all drawn up, the first of them reached only Nidrie's-wynd head ; and accordingly they marched up to the Castle-hill, and fanfared up and down the streets in a bragging manner, for an hour together, not one merchant youth appearing all the while to give them the least irritation : Then they dissolved at their captain, Mr. Weir the peutherer's house. One of them seized on the colours, and said, ere they were lodged, they behooved to goe and bring out Moffet and their friends who were in prison ; for they considered, so long as they had the colours with them, they would not be quarrelled ; but some others more sober standing by, resisted him, and so they disbanded :

They rambled up and doune all that night ; but their was no hurt done, so the Magistrats rejoiced. The trades would have been upwards of 1200 men ; but many of them ware from Leith, Dalkeith, Musselburgh, and all the country about, which should not have been tolerat : none should have mustered but prentizes. The merchand youths would have been about 500 ; and it is a very pittifull case to think that Edinburgh hes a difficulty to put out 3000 men in armes.

It is strange to think what rancor and alienation of mind this affair bred betuen neihbours, which spoke to me a great disposition to civill dissensions, and a ripeness towards discord in the hearts of people. The Trades their insolence in the affair was such a clear and dounright a prostitution of magistracie, that it became matter of admiration to thesse who are not acquaint with the toune's affairs, how the Magistrats should so tamely have digested that insolence ; and bein so far from seeking to have it punish't, that they extenuated it all they could. But the reason of it is very plain : the deacons of trades concerning themselves in the difference, did interpose, which proved so effectually, the Magistrats durst not refuse them ; for it is they who rule and influence all the elections ; and he who expects ane office does not weell to disobligde them. It's true, in the first hubbub and consternation they wrot a sharp letter against the Trades to my Lord Duke of Lauderdale, terming them factious and seditious villanes and rogues ; yet afterwards, when the Weapon-shawing was over, they by a second gave him ane accompt of it, wheirin they palliated and disguised the matter, and wholly excused the Trades ; and tho, by all the law in the world two or three of them, and particularly Moffat the fletcher, deserved the lenth of a tow for their tumult, and imprisoning the King's Magistrats, wheirby opprobrium was cast on the King himselfe ; yet the Secret Councill, upon a petition given in to them by the Trades in the beginning of September 1677, referr'd Moffat and his colleagues to the Magistrats of Edinburgh, who set them at liberty without the leifst stigma, after three months imprisonment. It might have been made a very plausible ground, wheirupon to threaten the Trades with the forfaitor and amission of their priviledges ; at leifst to have made them ransome and compone them ; tho in strict law, a few in ane incorporation (unlesse it be the wholle, or far the major part,)



committing a delinquency, ought not to endanger the liberties of the rest, who are innocent, or of their successors. But I have already shewn you the reason why the Magistrates were so disposed to swallow downe all this rough usage, for which they were much cryed out upon by the generality of the town. Many thought it a fair opportunity for casting the Deaconrie of the Flechers; for it's no art; and why should they be incorporat in a society? there is little or no skill required in it. And, as it is a very just ordinance of the Town of Edinburgh, among it's other statutes, that nather the deacon of the Flechers nor of the Baxters be upon the ordinar Councell of the burgh, consisting of 25 persons, because they selling things absolutely necessary for the life of man, if they were fitting their, might obstruct usefull and expedient regulations and checks to be made against them, to the detriment of the burgh; so, I think it were no unreasonable thing to dissolve their deaconrie as weell as the corporation of the Maltmen was, the reason being like; and that the Trades may not lose a suffrage and a deaconrie, erect another trade in their place. And really they are so inured and accustomed to blood, that sundrie of them think no more to kill a man then they doe to kill a Hyland cow; and it's for this reason, and on suspicion of cruelty, that the custome of England very justly repells a butcher from being upon any criminall assyse. Yea, I have heard some goe farder, that the very chirurgians there, because frequently employed in letting of blood, are not admitted upon assises; but I think this a stretch of the reason, which militates not with the like force in both cases: for with us, chirurgians are a very honest and famous calling, and are not received, upon the accompt of an exemption and privilege from passing upon inquests, in regard they are taken up and busied in things of publick utility, and are *quasi reipublicæ causa* absent. But I think it no stretch of the reason, founded on presumption of cruelty, to extend it to hangmen; for besides that he is infamous, the law suspects him as bloody: hence the Lords of the Session lately would not receive the hangman of St. Johnston a witness in a cause, but *cum nota*. It's true, indeed, they are not so contemptible abroad as with us; yet all have a horror at them. The Bourreau of Paris is a man worth 20,000 crowns per annum, keeps his coach, but no gentleman will drink with him, or

converse, if he know him: for some cryme one of his prædeceffors had committed, the said office is *nomine pænæ* entaill'd upon him and his posterity hæreditarily; (what if he want children?)—gladly would he resign the office and give a large sounge of money to be rid of it; but the Toune of Paris may not, at least will not, accept a resignation or dimission of his hand. By the very Pagan rites of old, a man was unclean who had touched the executioner, and theirfor all men studiouly shun'd him and run out of his way.

There was one thing feimed to stain the luster of the merchand youths; they suffered the apothecaries and cooks and taverners boyes, and fundry other mean people, (who are not under any deaconry,<sup>1</sup>) to muster with them: Yet I remember of a decission recorded by Antonius Matthæus, that in Utrecht, by a solemne arrest, the cooks ware found to have all the priviledges of merchands, after a very contentious debate betuixt them. It's true Antonius Faber, in *Codice Sabauda, tit. de dignitatibus*, tells, *quod coquus Principis annexam secum habet dignitatem ut et nutrix*; and Mr. William Thomfone, the wryter, tells me, that the first Laird of Anstruther was cook to Malcolme Canmoir; and that one of the Lairds since married a daughter of Lauder of Basse;—that makes Enfter very old, if true. As to the fee of the master cuik, I find it 5 lb. in the 5<sup>t</sup> chapter of the old laws of M'Colme Mckenneth, second of that name.

It's ane old controversy that betuixt the Merchands and Trades of Edinburgh, (as I have showed already,) and what burfts furth with much bitterneffe upon all occasions, they being jealous one of another; and it's for this cause why the Merchands, ever since the Toune acquired the Cannogate, which was in 1630, have ever refused to annex it to the royalty of Edinburgh, leift, by that acceffion it would too much increafe and strenthen the Trades, the Cannogate being most inhabited by such, and oft tymes better craftsmen than the tounsmen; who, out of a meir principle of malice, doe theirfor hinder them from their freedome within the toune, and taxes them exorbitantly where they stay, and confiscats their work, if they apprehend it within the ports.

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<sup>1</sup> Yet the contrare found by the Toun of Edinburgh's statutes in 1587; it's folio 69.

Some questioned by what power Lithgow and Collinton could act, there not being a quorum of the Councell, without which capacity they were but like other private men; especially wanting a cheiff officer of the forces: Yet I am of opinion, in such exigents as these that require haste, and expedition is their life, any one Councillor stands invested with a sufficient power to obviate growing tumults, and may give orders to the standing forces to suppress them, where the uproar is nottor; for a Councell cannot be convened so suddenly as the affair may require.

The use of Weapon-shawings is very ancient with us, and were founded upon our custome of attending the King in all his raids and weirs, 40 dayes, on the countrie's expence, and then they mouldred away. See 60 Act, Ja. I., Parl. 3<sup>d</sup>, anno 1425, and the many citations their. Upon this foundation did Act 25 Parl. 1663, Act 2<sup>d</sup> Parl. 1669, and Act 1 Parl. 1672, rear up the present militia for the superstructure. The Romans had such weapon-shawings, and we have rendered their word *ad verbum*, for they called it *armilustrum*: see Goldman on that word.

It is not of late that Edinburgh has had the reputation of a factious and a mutinous town: this is not my character; it's Heylin's words in his Cosmography, and in his description of Scotland, pag. . We have spoke above of the tumult of the 17 of Dec<sup>r</sup> 1596. When the Lord Seton, about 1555, was Provest of Edinburgh, there was an uproar in it, and two of the bailies came out to their provest at Seton; and he, finding they were accessory to the conspiracy, he imprison'd them in the pit of Seton, (a place I have seen,) which was a dreadful contumely; and rode in presently to Edinburgh, and appeased and choak't the commotion.

SUMMER SESSION, *Primo Junij* 1677.—This day, the Lords resolved to have taffeta purple gowns for the two moneths of summer, their cloath ones lyned with velvet being too heavie. Yet this did take no effect then; and they of themselves cannot alter the habit, since the King, by the 8<sup>t</sup> Act in 1609, and Charles I. by the 3<sup>d</sup> Act in 1633, are empowered solely to determine the habits of judges and magistrats: yet these Acts seeme to have been merely personall and temporall.

2<sup>do</sup>, The Lords ordained the Advocats to attend at 9 howers the moneth

of June, and halfe 9 all Jully; which does not agree with the 49 A& of the Parl. in 1537, by which 3 howers attendance is all [that] can be required of the Advocats: See this enlarged out of *Mænagius, &c. akibi*.

3<sup>do</sup>. One day at ane meeting for examination, the Advocats conveyeing very thin, it was enquired how many Advocats went to a quorum: Sir Androw Birny, Dean of Faculty, thought ten made a quorum, because that was the originall number of the Advocats at the first erection and institution of the Colledge of Justice; but in this he failed, for the 64 A& Parl. 1537, names but 8 Advocats, and 8 is a quorum of the Session, being the major part of the 15 Ordinars. Yet A& 57 *dicto Parlamento* requires 10 Lords besydes the President or Chancellor: but this is not observed; yea, in the Saturdayes, or in the afternoons, or when there have been 4 Lords at the fide-bar, and one on the bench of the Utter House, I have seen the Lords within not fix with the President. Only they pretend, that concluded causes may be advised, and deliverances on bills given, by a number under the quorum; yet I see no warrand for this, and concluded causes require a great deall of attention and skill; and the Lords present are not only wrytten in the Sederunt-books, but ware alwayes insert in the beginning of all decreets, even for some years after the King's Restoration in 1661, (tho now difused, I know not why,) that it may appear how many ware present at the pronouncing the decreet. Yet I know not how the Lords would take it, if one of their sentences ware offered to be reduced upon that reason, that it can be proven there ware not a quorum of the Lords at the advising it, whether it be ane interlocutory joint or definitive. *Vide* the other Manuscript, 3<sup>do</sup> Junij 1679.

*Eodem 1<sup>o</sup> Junij*, It was quæreed amongs the Advocats, If a dead corps might, in the law and practise of Scotland, be arreifted and stopt from interment, for debt, by creditors; on occasion of the Countes of Winton, who dyed this day, and being addebted to merchands, and to fundry trades people for vivers and other necessars, they made a great clamor, being poor; and fearing the Earle hir husband, because of the differences, would not ounne hir debt farder than hir annuity of 6000 mks. reached, which was all fornailed already, they ware talking of arreifting hir body: But

certainly, tho it be tolerat in Holland and some other places, it is reprobat by us as a most barbarous inhuman custome; yea, the law condemnes it for irrationall. . . . It could be done upon nothing with us, (except it ware upon ane expresse supplication to the Lords of Session, or to Secret Councill, which would never be granted,) unleffe upon a caption, which no messenger could execut, since it commands to apprehend the person of such a man or woman: Now, being dead, it's no more a person, no more a hypostasis, the union being dissolved. However, this arreisting has been attempted as to persones dying in prison, but was never allowed nor sustained; only I have heard that a man who dyes in prison, it's *ipso facto* a discharge of all his debts: this I think holds in England, but not with us. Yet when any person dyes in the Tolbuith, the Magistrats causes fight them before famous witnesses, especially the creditors, (if they can be got,) to shew they are truly dead, that no fraud be done of liberating living folk, under the pretence as if they ware dead.

14 Junij 1677.—The Secret Councill, upon a complaint given in by fundry gentlemen and others, in the west country, granted a commiffion to the lairds of Houston, Orbiston, Bischopton, Greinock younger, and Mr. John Preston, (he alwayes being one,) to try and judge some witches imprisoned at Dumbarton, who had been delated by Jonet Douglas, the dumb lassie, (of whom *vide supra* at large, num. 551.) as they who had made and roasted the portrait of Hamilton of Barnes, a good gentleman and weell loved their, and wheirof he dyed.<sup>1</sup> The pictures ware tane, and Mr. John Eleis, who was employed for the witches, told me he saw them, and that they ware the most childish thing could be, and had scarce any resemblance but 2 ftumps for hands, 2 for legs, holes for eyes and mouth, and made of clay. In August 1677 they ware put to the knowledge of ane affise, and found guilty and burnt. One of them was condemned upon litle or no probation, but fame and bruit of

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<sup>1</sup> James Gaffarell, in his pretty book of Unheard-of Curiosities, (*capite 5 et seqq.*) thinks these pictures and their efficacy and effects attributed by us to witches and to the devill, may be naturally done by Talismanicall figures and sculptures;—such ware the Brassen serpent, the Philistins mice, the Jebusites blind and lame, &c.

the country, on the pretence of the affisers their oun privat knowledge of hir guiltinesse; ane affiser being halfe a witnesse and halfe a judge; and tho the 63 A& in 1475 provides only ane affise of error against affises that clenges, and not where they condemne, yet affisers should not be permitted to cloak their oun private revenge and malice under that pretence; and it was thought the Secret Councell might, in materiall justice, supply that defect and call for the affisers, and if they found they had not proceeded *secundum allegata et probata*, or that they could give no rationall accompt of their *privata conscientia* wheiron they condemned, then punish them as *temere jurantes super affisam*. Wheirupon Mr. John Eleis did prepare a bill for the Secret Councell.

A. fol. 290, b.  
No. 587.

28 Junij 1677.—Sir Charles Erskin of Cambo, Lyon at Armes, and the Earle of Marshall, had in petitions at the Secret Councell anent the Earle of Kellie's daughter of the first ventre, with Collonell Kilpatrick's daughter, for the keeping of hir persone, hir father being lately dead; and both ware rivalls and competitors to have the girle to their sones, expecting a great part of Kilpatrick's fortune with hir, his sone being lately killed in the French war. The Councell sequestrated hir in the hands of the Archbisshop of S<sup>t</sup> Andrews, which was all one as to have given hir to the Lyon in keeping, his daughter being married on the Archbisshop's sone. Both of them sent over persones to Holland, to treat with Kilpatrick; and whille the Lyon was swell'd big with expectations of this match to his sone, and of succeiding in the Earldome of Kelly, his brother being dead without sones, only left his lady with child, and it depended on the event of that posthume, (and he was talking of care to be tane, for fear of supposition of a wrong child: see the title *de ventre inspiciendo*,) but it proved a boy; he is in the midft pulled away by a fever, and leives all thesse cares to his succeffors. *O fragilem hominum fortunam! Inanesque spes, quæ in medio sæpe cursu franguntur!* See this accompt of his death *alibi* in the other manuscript.

A. fol. 291,  
No. 588.

29 Junij 1677.—Do&tor Burnet, now Archbishop of Glasgow, pershues two comisar clerks of Peibles, for putting them from their place.

Alledged, They cannot be removed, because they possesse by vertue of a gift from Robert Leighton, when he governed that diocy. Replied, That gift could not defend them, because it was a *non habente potestatem*, he never being Archbishop of Glasgow, in so far as he was never legally translated from Dumblaine to Glasgow, as the Canons require; (see the forme of the translation marked by me *alibi* from the Service-book, in June 1677, on the translating of Mr. Murdoch Mckeinzie from Murray to Orkney.) 2<sup>do</sup>, The conjoyning of two in one office, and to the longest liver is unlawfull, and not to be permitted in any but proprietars; else administrators of bishopricks may, by such tailzies, survivances, and reversiones, forestall all the profit of places for ane age to come, and prejudge his successor in the place: which is most unreasonable, for if he may conjoyne tuo then he may put in fix, viz<sup>t</sup>, the father, sone, and grandchild, or brother, and so inhance all for 50 or 60 years to come. Duplied, By our law, translations are not absolutly necessar; (see A& 1 in 1617;) that it is but a Popish nicety, which can never be obtruded against so materiall æquity, wher they are invested in a place by one who had a putative title, and the King's call, and was in actuall possession, and holden and repute Archbishop; and they ware in *bona fide*, to take a right from him. As for the conjoyning, custome hes made the same lawfull, there being nothing more universall; as old Sir David Falconer of Glenfarquhar and his sone Sir David, ware conjunct comissars of Edinburgh; Mr. Harie Hay, clerk to that comissariat, had got the place also continued on his sone; Sir William Purves had done the same with his office of solicitor to his Majesty; and the Lyon had the gift of that office to himselfe and his sone; and Mr. W<sup>m</sup> Ramsay and Mr. Ja. Rocheid ware conjunct clerks of Edinburgh. Triplied, That any canonist who understood any thing of the investiture of the clergie in church benefices, would confesse that translation was absolutly necessar to give him a right to the benefice *ad quem*; for they goe upon two grounds: 1<sup>o</sup>, They accompt it *spirituale matrimonium* betuen the Bishop and his church; now the marriage knot cannot be dissolved till he be transferred. 2<sup>do</sup>, In imitation of the personall rights in the feudall law, their *breve testatum* or chartor, and their *investitura et inductio in possessionem*, the Canons have introduced presentation, collation, and institution; and wher one is trans-

planted, then the translation is his new investiture and induction unto the possession; and without that they acknowledge no right in his person, nather to performe spirituall offices within that diocy, or to intromet with the temporality and rents.—The Lords sustained the clerks their conjunct gifts, in respect of the custome to give the survivance of places, and repelled all the reasons of declarator and reduction against the same.

A. fol. 291,  
No. 589.

5<sup>th</sup> *Julij* 1677.—The Comfit-makers in Edinburgh were seeking from the Secret Councill to be erected in a company, and have the priviledges of a manufactory, conforme to the [40th] A& of Parl. in 1661, anent usefull manufactories that shall defyre to settle amongs us; for every age produces perfections in trades, and new inventions. The sugar-baking at Leith is declared a manufactor already. We have got fundry brasiers of late among us, who work weell.—For naturalizing and encouradging strangers to come and dwell amongs us, see the A& in 1669.

A. fol. 293,  
No. 601.

11 *Julij* 1677.—At the Criminall Court, the dyet was deserted against Robert Grahame, provest of Dumfreis, who was pershued for a litle ryot in breaking up the doors of a house, and taking a man prisoner furth theirow, after ane intimat suspension.

A. fol. 293,  
b. No. 608.

19 *Julij* 1677.—At Secret Councill, Mr. Robert Traill, having been apprehended the day before, was relegat to the Basse.

The businesse of the Earle of Argyle and the Macleans occasioned much heat; see it *supra* in July 1676, num. 489.

Thesse who had undertaken to drain and recover the sands at Montrose, by ditching out the sea, and gaining so many miles of ground, which, by sowing a seid on it, in few years would make it arable, and pay 30,000 mks. *per annum*, gave in a complaint against Erskin of Din, from whom they had bought the ground, that he had come in ane ryotous manner, and a convocation of his tennents, and throwen doune their dyke, which he alledged they had incroatched on his ground. His peek was, that he had sold it for 500 mks. and had retained no part of it after it should be recovered.—They compounded the matter.



There was also a petition given in by the Tutor of Waterton, complaining on the Bifchop of Aberdeen, that tho his pupill was uncontroverted patron (this is not true) of the church of Ellon, and had presented one Mr. George Milne theirto, yet the Bifchop refused to collate him, theirfor craved the Bifchop might be cited over : (fee the petition befyde me.)

This fame day, the Councell pafft ane imppofition of a turnor each footman, two each horfe, a baby each cart that fould paffe, for years, ather the bridge of the Abbey of Hadington, or Linton Bridge, and that for making up a flock to repairing them, being ruinous.

24 *Julij* 1677.—The Chancelor's caufe with my Lord Melvill, which he gained in winter laft, on the 20 of *Februarij* 1677, (fee it in num. 548,) is now again revifed and difpute. Melvill having borne it off all this fummer feffion, (notwithftanding all the foliftation the Chancelor did make for a hearing,) till my Lord Lauderdale's arrival here ; and he being come, Melvill turnes the chaffe and obtains a hearing, which the Chancelor would gladly have fhifted ; and by my Lord Lauderdale's prefence overawing the Chancelor's friends, he gains the caufe : For the Lords this day found the King, as fuperior of the eftate and lordfhip of Levin, had right during the vacancy to the retoured duety, (by which taxations were impofed of old :) Which retour'd duety General Leffly had chofen to be a feather, to denote his calling of a foldier, but Dundonald had lately converted and changed it unto 100 lb. Scots yeirly : and the truth is, retoured dueties are alwayes in money, tho feu-dueties may, and oftymes are, in other kinds of things ; But as for the maills and dueties, the Lords found they ware not *bona caduca*, and nowayes in non-entry, there being heir no contempt nor fault againft the fuperior, fo much as præfumptive or interpretative, which is requifit to all non-entries ; but that they ware *bona vacantia*, and lying in *hæreditate jacente*, (tho this was a new notion of it, never before heard of in our law,) and fo fell under adminiftration, and would belong to a curator *bonis datus*. . . . .

A. fol. 204,  
No. 614.

On the 1 of Auguft, at the Exchequer, the maills and dueties of Levin ware given by the King's letter of adminiftration as *pater patriæ*, to David Melvill and his airs, as *bona vacantia et nullius* ; and makes him *curator*

*bonis*, to defray the debt, for the use and behoof of the possible air, and as his *fidei commissarij*. It did not bear Given under any seall, and it was quæreed what sealls it should passe: It being the first gift of that kind, the Exchequer may supply the defect, and ordaine it to passe what sealls they please. Presentations of the Archbischops and Bischops passe all the sealls; presentations to other beneficed persones passe only the Privy Seall; patents to noblemen goe, *per saltum*, to the Great Seall. They say, the Lords, this session, fand that the bedell of the Chappell-royall's gift needed not passe any sealls, that having been objected against it as ane defect and informality. . . . .

Some superiors, when they give chartors to their vassalls, (particularly Argyle, &c.,) they make themselves airs of tailzies to their vassalls, in the third or fourth place, degree, and order of substitution; by which oft they fall to succeid in the property: but the vassalls may alter it by a second bond of tailzie, or by granting a bond, wheiron the lands may be apprized from them.

*Supra* at number 548, in Melvill and the Chancellor's case, I have remarked a very loyall clause was in the former Dukes of Hamilton their chartors: now I am informed, that in the chartor of this Duke, and of some other great persones, (which was also craved in passing Dom. Pedro Frazer's chartor of Dores [Durris], on his father's disposition and resignation to him, but was refused by Dundonald: see the disposition and chartor *apud me*;) their is a very different clause, viz., that in case any of them commit treason, they shall not forfait their lands, but shall descend and goe to the next air: This is *peffimi exempli*, and disadvantageous, and reflecting both on the honor, profit, and credit of the Croun.

A. fol. 295, b.  
No. 616.

*Eodem die*.—Bruce of Broomhall was this day fyned at Secret Councell in 100 lb. sterl., because a conventicle was kept by his tennent upone his ground, conforme to the late A& of Secret Councell, and the former precedent against S. Jo. Gibfone. The toune of Coupar was also fyned in 50 lb. sterl. for suffering three prisoners to escape.—William Cunnyng-hame, in the links of Abbotshall, and some other maltmen in Fyffe, ware fyned for buying bear cheaper than the 7 lb. the boll, expressed in the

Councell's proclamation, and for selling their ale dearer than 16 pennies the pint. Whatever any of them acknowledged on oath they had given for the bear they had bought, the Committee considered the number of the bolls, and what it fell short of the price at 7 lb. per boll, and fyned them in a summe equivalent.

The Councell wrot a letter to his Majesty, desiring he would be pleased to grant warrand to his Thresurie for lifting as much money as will repair the Castle of Blacknes for holding prisoners, the Basse being already full.—His Majesty sent doune a warrand conforme.

26 *Julij* 1677.—The Master of Rae obtains a decreet against the Stranaver men for 40,000 mks., as the avall of the hareships and depredations made by them during that inroad unto Caitness, in 1668. The depositions of the witnesses, amounting to upwards of 30 sheits of paper, the Lords referred to two of their number to peruse; for it had been impossible at any one sederunt to have gone throw them all, much lesse have considered what was proven by two concurring witnesses, and what not: These two, viz. Forret and Newton, to whom it was recommended, drew them all under generall heads, and marked what each of them materially deposed, and how many agreed in one thing. A. fol. 297,  
No. 624.

At Secret Councell this day, Macintosh petitioned for fyre and sword against some of the Clans that ware broke loufe.

27 *Julij* 1677.—The Duke of York, as Hy Admirall of Scotland, raised a Declarator against the Earle of Argyle, that the Spanish ship cast away upon the Iles of Scotland, *in anno* 1588, being one of the prime ships of that Armada, belonged to him as Admirall, by which office he hes undoubted right to all wracks: see a litle of this action in another litle manuscript besyde me. It was answered for Argyle, That he had the sole right to that ship, because his father had a gift of it from the Duke of Lennox, who was Hy Admirall for the tyme, and it was confirmed in Parliament, and cled with possession, by taking guns and other things furth theirow. Replied, The gift was null, not being subscryved by his Majesty, tho, by the narrative, it appeared it was so intended; for A. fol. 297,  
No. 625.

his Majesty was insert as a disponder. 2<sup>do</sup>, The quota to be given to the Duke of Lennox was left blank, which proves it was but an unfit evident; whereas lately, to ocular inspection, there is filled up the 50th part, which is so unfuteable and disproportionat to his interest, that it clearly appears that could never be commoned. 3<sup>do</sup>, The Duke of Lennox could not dispose upon that which was not in *illius dominio*,—but such was this ship; for the law has condescended on certain wayes how property shall be acquired, and has determined that it's not *nudis pactis*, but *traditionibus*; and possession is an essentiall requisite and ingredient to the constitution of property with us. Now, Lennox had no possession of it; and as to these faint deeds of possession that Argyle condescends upon, whatever they might import in things lying upon the earth, they can never passe for a sufficient possession of things lying in the bottome of the sea, *in fundo maris*, for they require another kind of possession ere one can have right thereto, and that is loco-motion; they must be stirred out of the place that possesses them: This ship is in a manner *sub maris dominio et potestate*, the sea is the *medius obex*, the *medium impedimentum* that hinders acquisition of property in it; this *obex* is not removed nor overcome, but by loco-motion, which Argyle cannot pretend to. Then Sir G. Lockhart urged, with a great deall of elegance and subtlety, the parallels of a *fera bestia* wounded, of a treasure found, or of mynes in the bowells of the earth; and of the *aper tane in rete et cassibus*, mentioned by *Ulpian, Pomponius, et Proculus*, in *L. 44, et 55, D. de acquirendo rerum dominio*. He farther alleged the giving the Admirall right to wracks *in fundo maris*, before he apprehended any possession, was to state the right of property of these wracks in the person of each Admirall, so that he might dispose upon them as freely and absolutely as he might have done upon any other thing that was his uncontroverted property: and at this rate, that ship of the 1588 would, by thir principles, have belonged to the Earle of Bothwell, who was then Admirall of Scotland, and would have transmitted and devolved to his heirs and successors, if it was his property, which is absurd: He might have gifted it, and in generall all the wrack that had happened on the coast of Scotland since the flood of Noah, which is equally absurd, to imagine, that

ane adminiftrator of ane office can gift its cafualties in great, or theirby foreftall, prevent, and anticipate the benefit of his fucceffors; (*vide fupra*, num. 588;) for ane Admirall can difpofe upon no more of naufrage goods than he knew, and no more of what he knew than he had by a fix't and folid poffeffion (tho not totall) put himfelfe in a rationall hope of compaffing: all the reft ftands as it ware in its native freedome, continues to be *nullius*, and remains to be the fruit of fome fucceeding induftrie. Duplied, That the King being air to Lennox, is bound to warrand his gift in favors of the Earle's father, fince the Admiralty accrefced to the King, and was by him conferred on his brother; that there is no warrand in law for that diftinction, why more folemne poffeffion is requifit of things detain'd *in fundo maris* than of any other; that law attends no more but a fymbolicall poffeffion; a poffeffion of a part to give right to the wholle. . . . And loco-motion was called ane idle fancy; for [if] it was fupposed the fhip ware brought to the furface of the water, and fell doune again, ware not that a pregnant deed of poffeffion?

Argyle himfelfe had a litle difcourfe, fhowing the vaft expence he had been at in making the difcovery, and wifhed once it ware brought above board, and ware on the dry land, ere we difcorded about the divifion of it, elfe it fhould in earneft verify the proverb of the King of Spain's gold; that if any of thefe gentlemen doubted of the truth of his difcovery, he fhould take them doune and let them fee it, if they ware content. The Earle of Kincardin, as Judge Admirall, had alfo a fhort addrefle to the Lords. But they found *una voce, nemine contradicente*, (that the Duke of York might not imagine he had got wrong, which might have been imagined if any had woted for him,) the Earle of Argyle had beft right; and theirfor they præferred his gift and fufained his defence theiron, and affoilizied from the Duke of York's libell. The Duke would think himfelfe but foberly oblidged to them who advifed him to this groundleffe procefs, which was thought to be by the information of Sir G. Lockhart. But his Hienefle wrot doune a very complimenting letter to Argyle, approving the juftice of the Lords fentence, and fhowing his hearty compliance and acquiefcence theirwith.

There was alfo another clame to this fhip in the perfone of Tillibardin,

now of the Marquis of Atholl, who laid it at the Duke of York's feet;—it was a gift from King James to it, in favors of Tillibairden. But it was of no moment; for, 1<sup>o</sup>, It was præscryved, nothing having followed upon it by the space of 40 years, nather was it ever cled with the leift possession. 2<sup>do</sup>, It was only granted by the King, and so flowed a *non habente potestatem*, the King being denuded in favors of the Admirall by the patent.

A. fol. 298,  
No. 629.

See 9 of August 1678,  
num. 2, [M.S.  
E.] James  
Lermont's  
case, it's page  
19, 20, 21.

30 Julij 1677.—This day at the Criminall Court, one Cunyghame, cook to the Earle of Kinghorne now Strathmoir, was pershued for the treasonable and wilfull fyre-raising in the House of Glamis: There were fundry præsumptions libelled against him, the Justices referred the consideration of them to the Affise. The Affise, to mock the Justices, returned him guilty of fundry præsumptions of his being the doer of it: The Lords would have had the Affise enclosing again, and making their verdict that he was simply guilty. They refused, and indeed in law could not, for by the 91 A & Parl. 1587, if any assysers, after they are inclosed, doubt and goe out, or if others come in to them, the pannell shall be *ipso facto* clenged; and it ware a strange præparative to force ane assyse to inclose again after they have published their verdict, no man's life ware secure at this rate. Their verdict was found sufficient for commuting the ordinar punishment, *in pœnam extraordinariam*, of banishment out of Scotland. But Strathmoir being displeased, applyed to the Secret Councill, who banish't him to the plantations; but he is so wicked and croce a fellow no ship will adventure to take him in. It was pretty odd in the Councill to alter the Justice's sentence, who ware *functi*, especially to make it more severe; for wheirever the Councill medles with the punishment of malefactors, it is to mitigat, *œquitate quadam prætoria*, the extremity, but never, *rigore tribunitio*, to augment it. See the Criminall Adjournall-books, for the burning of Frendraught Tower, in 1632; see the case of Sir Ja. Stamfeild's woman, who attempted to burne his house, in Mck.'s Criminalls, part 1, cap. 1, pag. 10.

A. fol. 298,  
No. 630.

*Eodem tempore*.—Robert Malloch was also pershued before the Justices for stricking a sone of David Boid the merchand, within the Seffion-

house, in the afternoon, the tyme some Lords ware examining witneffes. Alledged, The 173 A&t of Parl. in 1593, means when the hail Lords are met in the forenoon, so as to import the pain of death or cutting of the hand there mentioned; 2<sup>do</sup>, He was *laceffitus et provocatus*, and theiron hes raifed ane exculpation. The most that could have been made of it was a litle ryot, for I think the A&t means not the afternoon, *et in pœnalibus quæ odiosæ sunt statuta extendenda non sunt*, and he may be put to take a remission: See the scuffle fell out betuen Mr. Rorie M'Keinzie elder and Mr. Jo. Stewart of Ascog, advocats, at the bar in November 1675, and the observes there.—In August 1677, Robert Malloch being put to the knowledge of ane inquest, and one of the most materiall witneffes being wrong designed in the copie given to the pannell, and so casten, being designed Androw for Alexander, since the pannell could not prepare objections againt a man he knew not, he was clenged for lack of probation. The English are most exa&t in such lapses as thesse: See instances of wryts casten among them becaufe of false Latin, Philips's *Studij Legalis Ratio*.

*Ultimo Julij* 1677.—The Secret Councell revived their A&t in Januar A. fol. 299, No. 633. last, anent the price of the bear at 7 lb. the boll, and the selling the aill at 16 pennies the pint, for the crop 1677 upon the ground, to continue for the enshueing year 1678.

3 *Augusti* 1677.—A woman in St. Johnston was condemn'd in the A. fol. 300, No. 636. Criminall Court to be hang'd for murdering a child shee had borne in fornication. Her conviction proceeded upon meer præsumptions, and thesse not very violent ather: as, that shee had lyed in the place which shee first named where shee had buried her child, for it was found shee had clandestinely buried it in another part; 2<sup>do</sup>, that shee had called for no help or assistance in the bringing furth the birth, tho shee was within a toun—but this might be throw shame, and is only *crimen in suo genere*; 3<sup>do</sup>, there was a nip found in the child's neck,—but that might have been gotten in the streffe of labor. (*Vide supra* June 1676, the skipper's wife in Dyfert, *num.* 476.)

A. fol. 300,  
No. 637.

7 *Augusti* 1677.—My Lord Cardross (besyde his former fyne of 1000 lb. sterl.) is this day fyned in the halfe of his valued rent, for chriftening two children by unlicenced minifters, contrare to the [6th] A& in 1670, and refusing to depone theiranent. He falling very fick, on the 12 of August 1677, gave in a bill to the Secret Councel, met in the Abbey, desiring liberty to be transported to the toun, where he might be with more care used in his sicknesse. This bill was slighted, at which the Earle of Mar took offence.

A. fol. 300,  
No. 638.

4 *Septembris* 1677.—Sir G[eorge] Mckenzie is this day receaved King's Advocate at Secret Councell, and his Majestie's letter anent the Officers of State their being removeable at his pleasure, is approven: See both thir at large in my collection of the Seffion occurrents *alibi*.

A. fol. 300,  
No. 639.

6 *Septembris* 1677.—This day, John Hamilton, sone to the Laird of Inchgotterick, Patrick Burne, Irishman, and Robert Dicky, in whosse house they ware apprehended, ware pannelled in the Criminall Court for cunzeing of false mark peices. Hamilton and Burne confest it, only deprecated their sentence that it might be only banishment: Dickie denying all, there was probation led against him; a little naked boy of 14 years old, not worth the King's unlaw, and *consciens criminis*, being receaved *cum nota*, did evidently make him guilty of art and part of acceffion and knowledge; all the other witneses said nothing, but that he refistid Sir Jo. Falconer's men when they came to apprehend the false coiners, and did beat them: (See the libell and indytement besyde me: see the long dispute against the relevancy theirow in the Adjournall-books, made by Mr. John Eleis and myselve, against Sir G. Mck. in his first appearance and act as King's Advocat.) They ware put to the knowledge of ane assyse, who found Hamilton and Burne guilty on their oun confessions, and clenged Dickie for lack of probation; wheirupon the Advocat protested, he might be still heard to pershue him for refisting thosse cled with the King's authority, and hurting them; and accordingly he raised a complaint against him at Secret Councell, with answers theirow. But Dickie, hearing they intended to imprison him again, he keip't himselve



out of the way. The other two having applyed, on the 3<sup>d</sup> of October, to the Secret Councell for a mitigation of their deserved punishment of death, which the Justices had superceded to pronounce to give them tyme, the Councell ordain'd them to be banish't, they finding caution under the paine of death, and never to returne nor to use that unlawfull trade elsewheir. Burne being a stranger, caution was imprestable for him to find, and so the Councell's favor might be elusory and ineffectuall, he gave in a bill entreating they would accept of his oath, which was all he could doe, that he should never returne again. (*De falso nummario et falsa moneta*, see Matthæus and other criminalists; see Mck.'s Criminalls, *titulo* of falsehood, pag. 142.) Many complain'd that they ware not hang'd, and thought the preparative bad and had no precedent, for all the false coiners standing upon record in our criminall books had been punished by death. If they had revoked their confessions when they appear'd upon the pannell, *Queritur*, If their revocation would have been admitted? I think not, because they ware past their minority: (*Vide supra*, Dec<sup>r</sup> 1674, Mr. Ja. Mitchell, *num.* 451; *item*, Januar 1676, Clerk and Ramsay, *numero* 459:) Yet I hear that a confession emitted by a party before fewer than three of the Lords of the Justiciary may be revoked, as not before a quorum and competent number. And it is a good *cautela*, where the probation is not full against a criminall, and it's apprehended he may deny it before his libell be read, or the assyse called, to try at him if he will voluntarily confesse it; which if he doe, then to proceed and judge him, but if he doe not, then it will be fit to send him back to prison till farder probation be had; for if they proceed, the assyse must clenge him, and so he can never be accused on that head again.

On the 18 of September 1677, Andrew Adam killed his father with a fore hammer, by which he gave him 3 knocks on the head and broke his scull. The lad had been observed to have been hypocondriak for two years before, but no fullen melancoly and discontent can excuse parricide. He was arraign'd before the magistrats of Edinburgh by their fiscall, being tane in *flagrante crimine*, the next day, found guilty on his owne confession, and hanged on the 20 of September within three suns, and his right hand that

A. fol. 300,  
No. 640.

did it cut off with ane ax. That Andrew Adam was frappe and his head diftempered was evident, and the reveries he used to myselfe ware a sufficient conviction of it; yet thesse small degrees of fury ware not of that importance as to excuse him *a tanto*. . . . .

A. fol. 301,  
No. 641.

3<sup>th</sup> Octobris 1677.—Or<sup>o</sup> Rutherfuid pershues the Shireff of Tivedale and Magistrats of Jedburgh before the Secret Councell for wrongous imprisonment of him, and rude usage. In the defence it was alledged, that by the Border Laws (see them in my Balfour's Practiques) one may be summarly arreifted for debt, becaufe of the great convenience they have of shifting themselves and slipping from the one kingdome to the other, and that theirfor the Lords of Seffion have allowed of this custome. This is like the praetise in the Admirall Court, causing the parties find caution both *judicio fisti* and *judicatum solvi*; which the Lords found not unreasonable on the 16 of Nov<sup>r</sup> 1636, (Stewart and Ged,) becaufe of the vagrant condition of strangers and seamen, and others most interested in that Admirall Court. The defenders, after probation, ware affoilkied, and the pershuar, for his calumny, fyned in ther expences.

A. fol. 301,  
No. 642, § 1.

*Eodem die*.—George Young, late bailzie to my Lord Winton, in his lordship of Kirkliston, now sold to Hopton, pershues John Hope of Hopeton before the Councell for a ryot, in spulzieng and leading away his teind of his peice land besyde Winchburgh without any right theirto, and George had a standing tack. After probation, the Lords found he (Hopton) had done wrong, and theirfor ordain'd him to restore, and fyned him in 20 dollars. If a tennent's tack be expired, tho I have warned him to remove, yet I cannot enter *brevi manu* to the lands without a decreet of removing: it's true the warning takes of tacit relocation; even so in a tack of teinds expired, ane inhibition takes of the tacit relocation, and founds a title for ane action of spulzie; but one may not after ane inhibition, (which will be got *periculo petentis*;) nor becaufe the tack is expired summarly, and *propria autoritate*, medle with and draw the teynd; for if the other person oppose, then the drawer will be guilty of a ryot; nather will the inhibition nor expiration of the tack defend

him therefrom, but what he does ought to be *authore prætoris*, and only pershue a spulzie of teyndis, and then enter; for *non est singulis concedendum quod per magistratus expediri debet*.

*Eodem die*.—Sir John Harper, Shireff-deput of Lanrick, and fundrie other Shireffs, were summoned in before the Councell, to report their diligence for discovering Conventicles, conforme to the injunctions of the A&S of Parliament in 1670. *Item*: Sir William Binning, late Provest of Edinburgh, gave in a bill to the Secret Councell, desiring he might be continued as the persone who was to subscribe all the Admiralty passes, in the south distric of Scotland, (*vide supra*, Februar 1677, numero 554,) since he was known, and the present Provest was not versant in such affairs, &c. The Councell granted it, tho their oun former a& bore they should be subscribed by the Provest for the tyme being; but this was a baffle to Francis Kinloch in the very entry of his office.—*Item*: § 4. A letter from his Majestie ordaining 40 mo[re] men to be added to his troupe commanded by the Marquis of Atholl, without any other officers to command them then those that are already. *Item*: On supplications given in by Mr. Geo. Scot of Pitlochrie, and Frazer of Brae, they are liberat out of the Basse, upon finding caution to keep the peace and re-enter when called.—Bennet of Chesters gets 3000 mks. of his 4000 mks. of fyne remitted, and the exaction of the other 1000 mks. superceeded, till they see what his deportment and behaviour will be. We have marked *supra*, that Tolquhon was set at liberty and Jerefwood had got a discharge of his fyne: Whence all this favor came to the Non-conformists seemed strange to some. It was a politique of my Lord Duke of Lauderdale and his Dutcheffe to render himselfe gracious and acceptable in the hearts of the people, and regain his lost credit; which undoubtedly was likeways a cause that made him listen and give ear to ane indulgence and accommodation with the Presbyterians; for he was serious in it, and did it not meerly to cajoll or gull them. The carriers on of it ware the President, Argyle, Melvill, and Arnifton, with James Stewart, and the Ministers of that party, who ware allowed freely to come to Edinburgh. They offered to raise 15,000 lb. sterl. presently for my

A. fol. 306,  
No. 642, § 2.

Lord Lauderdale's service, and to contrive the elections so that in a Parliament he should carry a subsidy, and the President get a ratification of what he pleased, providing their Indulgence were secur'd to them by Act of Parliament, so that it might not be next day recalled: All thir propositions my Lord Lauderdale greedily embraced; but when they came to explain the way how they would effectuat all this, he could not comprehend it so weell, wheirupon it stood. The Bischops, on the other hand, finding this to strike at the very vitals of their occupation and Diana's shrynes; they, to counterballance, resolve to ply and bid as fair as they are able, to get his Majestie's supremacy in spirituall matters so qualified, that the King may give way to erect a Court of Hy Commiſſion again, in which they may act by themselves against all recusants. It's like, if this were granted them, it might prove a very ready means to break their neck. At last my Lord Lauderdale, at the Secret Councell, on the 9 of October, publicly disowned that ever there had been any audience, treaty, or capitulation, between him and the Non-conformists, lest the rumour thereof might prejudice him in the affections of the English clergie: and it was reported, that the Archbishop of St. Androis had wryt of it to Canterbury, and Morley Bishop of Winchester, and they had applyed to his Majesty, who wrote peremptorly to my Lord Lauderdale to desist. Whowever, he ceased not to doe favors to private persones of that party, as we have instanc't already, in releasing their persones or fynes.—At this tyme also, one Mckilichan, a minister in the Basse, was liberat, but confined to the Ile of Skie or Ila; and another, called Mr. W<sup>m</sup> Hog, was confined to Kintyre. Some hardly look't upon thir transportations as any curtesie; however, they will have occasion to plant the Gospell in those barbarous places, which is more meritorious than to labour in their ministry here, where there is enough already.

A. fol. 301,  
b. margin.

In the midle of October 1677, on report of many robberies and deprædations in the Hielands, and that they ware like to break louse, there was 1600 stand of armes, muskets, powder ball, bandeliers, &c., dispersed, to Stirling and other places. Some apprehended it was to be in readinesse against the Western malecontents, if they should attempt to ryse in armes,

which was accompted the more probable reason of the two. (See the continuation of this storie, anent the bond and Western expedition, in my other manuscript, pag. 167, *et seqq.*)

WINTER SESSION, 1677.—*Primo Novembris* 1677.—The Lords fell upon some Acts of Sederunt, 1<sup>o</sup>, Discharging all sollicitations to be made to the Lords of Session by the parties their Advocats, &c.—Some named Tolquhon, and his brother Thomas Forbes, as they who gave principall occasion to the making this Act against sollicitations. 2<sup>d</sup>, [Anent the enrolling of causes &c.] The 3<sup>d</sup> was, prohibiting the cloak to be kept back at 12 howers at anies desire whatsoever. A. fol. 302.  
No. 644.

*Eodem die*.—At Secret Councell, James Row the merchand was fyned 500 mks., and sent to prision till he payed it, for refusing to open his doors to Robert Johnston, major to the Toune of Edinburgh, who came on the Sunday, before the tyme of sermon, to searck for conventicles, and for upbraiding him with opprobrious language. A. fol. 302,  
No. 645, § 1.

One Jamefone having complain'd upon the Commiffioners of the Borders for refusing to give them up their bond of 200 lb. sterl., in caise he did not reproduce another person, and which he had done : It was alledged, that they did not produce the person on the day they keep'd their Warden Court, that they had affisers and witneses ready, and came upon great expence from sundry places of the countrie, and the dyet was continued throw the not presenting him then; and the offering him 2 or 3 dayes afterward was not eneugh, because they being disperfed, the summe of the bond would not bear the coft of conveening all the parties concern'd again. My Lord Duke of Lauderdale declared, he would suffer nothing that might discourage thofe gentlemen that had the trust of the peace of the Borders concredited to them by a commiffion under the Great Seall of both kingdomes.

28 *Novembris* 1677.—This day Captain John Rutherfuid, and William Rutherfuid, messenger, ware hanged at the Graffe mercat of Edinburgh, A. fol. 309,  
No. 664.

for forging of false wryts; (see a litle of it *supra*, folio 85, *num.* 101.) The decreet of improbation was given upon the indire& probation in 1671, and was carried amongs the Lords only by one vote; and Sir Jo. Nisbet was so unsatisfied in his private opinion, that, tho otherwayes violent eneugh, yet suffered them all his tyme, during the space of 6 years, to ly in prifon, and had no clearneffe to infist againft them criminally for their life, and, at the moft, defigned only banifhment, and they never expected more. But S[ir] G. Mck[einzie] being entred, and refolving to give the world ane experiment of his juftice, and that he would purge the prifons of theffe his predeceffor had left him, becaufe no money had been offered him to infist againft them;—he ftages them and puts them to the knowledge of ane affife, and, *in modum probationis* to the inqueft, produces the Lords of Seffion their decreet of improbation, who thereon find them guilty, and the Jufticiary Lords fentence them to be hanged. The prifoners clamored much againft Robert Androw, who was the great folifter of the affair.

A. fol. 309,  
b. No. 668.

29 *Novembris* 1677.—At Secret Councell the Lairds of Grant and McIntosh are fyned in 200 lb. fterl., becaufe their men, for whom they, as the heads of theffe two clans, ware bound, had committed a groffe ryot, in burning a houfe, &c., (which is ftatutory treafon;) and probation was led upon it, tho the defenders ware abfent; wheiras, in ordinar forme, all that ufes to be done in that cafe, is only to denonce them fugitives: yet here the Councell took probation by witneffes, and fyned, *ut supra*.<sup>1</sup>

A. fol. 310,  
b. No. 672.

6<sup>to</sup> *Decembris* 1677.—The Countefs Dowager of Home, upon a fupplication given in by Collonell Jo. Home of Plenderghaift to the Secret Councell, was ordained to exhibit the aireffe of Ayton, hir grandchild, the nixt Councell day, at the bar, to the effect they might fequeftrat hir in a

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<sup>1</sup> [The fine was £200 to the King, and £100 to the pursuers, Archibald Dunbar of Newtown, Alexander Dumbreck in Auchmadies, and his spouse. The defenders in this case of hame-sucken, violence, and lawless outrage, were headed by Alexander Grant, second son to the laird of Ballindalloch, and Donald McIntosh of Innerey.—*Regist. Secr. Conc.*]

neutrall hand, in regard the Countess was alledged to be resolved to dispose of hir in marriage, without consent of hir freinds on the father's syde. But the designe of the sequestration was to bestow hir on W<sup>m</sup> Ramsay of Idington younger. After intimation of this order of the Councell, the young gentlewoman was conveyed away to Berwick, and their married to Home of Kymmerghame. Wheirupon a new complaint was raised against them at Secret Councell, for their contemptuous disobeying the Councell's order ; and after many dyets of probation, Joseph Johnston of Hilton, and Home of Nynewalls, ware found acceffory, and on the 16 of March 1678, ware fyned at Secret Councell, Hilton in 2000 mks., and Nynewalls in 1000 mks. ;—young Kymmergeame, for the clandestin marriage, contrare to the A& in 1661, in 1000 mks., and the young lady in as much. Old Kymmergeame dyed during the dependance, and so escaped fining. Polwart's acceffion was not proven. The sentence farder declared, that young Kymmerghame had lost his *jus mariti*, and thee hir *jus relictae*, conforme to the 9th A& of Parliament in 1672.<sup>1</sup>

10 Decembris 1677.—At a meeting of the Royall Fischeing Company, ane A& was made, that no merchand or other persone should have liberty to export herrings, or other fishes, save only the members of the Royall Company ; and that none should have liberty to fish but themselves, and such as get licences from them ; and they are only permitted to fish for serving the country, and its consumption, and not to send abroad ; by which many in Glasgow, Dumbar, &c. will be great losers, who, by the export of fishes on their ounie privat adventures, brought in above 400,000 marks yeirly ; and the King's customes will suffer by it. The remedy will be, to enter unto the said Company ; only they would be abler with £50 Sterling alone to manadge the said trade, than with £200 given in there.

A. fol. 311,  
No. 674.

*Eodem tempore*—The Lords of Session at this tyme ware thinking

A. fol. 316,  
No. 675.

<sup>1</sup> The benefit of this *jus mariti* and *jus relictae*, was gifted by the King at Exchequer to the Earle of Home, on the 20 of July 1678 : the debate will come in upon the declarator of it.

upon an a& for short plaiding, to curb the long and tedious harangues in the Inner House. As also, they made ane a& for ordering the taking of witnesses' and parties' depositions in the afternoon, with more order and easinesse, by excluding all parties, except the Lords' clerks, and persones deponing, from entering the Inner House, scarcely admitting the Advocats. It was a shame to see the confusion there was before, and many hearing what the witnesses said, who ought not to have heard.

A. fol. 312.  
No. 683.

13 *Decembris* 1677.—The Toun of Edinburgh having charged, by Geo. Blair, their factor, both the toun of Aberdene, and the fishers of Glasgow and Greinock, upon their gift from the King of marking and jading all their barrells. Alledged against, 1<sup>o</sup>, They want a decreet conforme: 2<sup>do</sup>, It's præscryved, and in defuetude; and Edinburgh never attained possession by vertue of it: 3<sup>o</sup>, The Royall Fishing Company exacts the same dueties from them, and they cannot pay to both: 4<sup>to</sup>, For Abirdene alledged, by the 141 A& Parl. 1584, they have a right to it themselves; and it is contained in all their infestments since. (See the answers to thir, both in the information against the Magistrats of Abirdene, and in the information against the fishers in Greinock, &c.)

A. fol. 314,  
b. No. 704.

7<sup>th</sup> 8<sup>th</sup> 9<sup>th</sup> and 10<sup>th</sup> dayes of Januar 1678 Mr. James Mitchell was upon the pannell at the Criminall Court, for shutting at the Archbishop of St Androis. He was sentenc'd on the tenth, and hang'd on the 18<sup>th</sup> of January thereafter.<sup>1</sup> The law that reached his life, was the 4<sup>th</sup> A& of the Parliament 1600, against invading and pershueing of Councillors, tho it was only made *ad terrorem*, and in defuetude, and never practised as to the paine of death, for otherwayes, *conatus sine effectu consummato nunquam punitur capitaliter*. There was much debate anent the way of proving the qualification of the said A& of Parliament, that the Archbishop was invaded for doing his Majesty's service; for that being

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<sup>1</sup> See the extracts of the full debate as it stands recorded in the Books of Adjournall, insert in another MS., (C.) at pag. 53, *et multis sequentibus*. [See foot note to page 186.]



*animi*, can only be spelled out by præsumptions. Mr. John Waus, in his oath, was more positive then any other for proving this; for he declared, that having asked Mr. Mitchell, how he could adventure in cold blood to assassinate a man, especially a churchman, and one who had never wronged him, he answered, "And call you that cold blood, when the blood of the saints," (meaning those executed in 1667 for the rebellion 1666,) "is yet reeking hot at the Croce of Edinburgh?" The Justices found it was not enough to prove the assaulting a Privy Councillor, but the qualification of the Act of Parliament behooved likewises to be proven. As to the dememoration of the Bishop of Orkney, it was alledged the 28 Act, James 4th, anno 1491, makes it not capital. The Advocate, Sir George Mackenzie, at last declared he past *pro loco et tempore* from the dememoration, in so far as it might import *ultimum supplicium*; then alledged, he was not guilty of *assassinium*, because Carpzovius, in his *Praxis Criminalis Saxonica*, shows that crime is only committed by one who is hired with money to kill another. (See the Advocate's own Criminals, *Tit. assassinium*.) Then he denied the fact; as also his former confession, as also revoked it as extrajudicial, and not being made before the Judge competent, viz. a quorum of the Justices and the Assize, but only before some Councillors; and so it was not binding but null; and cited Boffius his *Practica Criminalis*, Julius Clarus, and Ant. Mathæus, in their criminals, and the Advocate's own book of Criminal law; and Craig *feudorum*, pag. 38, shows the Secret Council cannot judge of life or fortune.—The Lords of the Justiciary found the confession, being emitted before the Duke of Lauderdale, being then the King's Commissioner, and the Committee of the Council was judicial, and that it could not be retracted by him. Then alledged, it was a confession elicited by torture, and so revocable. This was repelled, because when he confessed, there was neither torture nor threats adhibit. Then he founded on a promise of his life. This the Advocate debated against as not relevant. The Lords sustained the promise of life relevant. Then the witnesses were examined; the greatest that ever appeared in a criminal cause with us: The Duke of Lauderdale, the Chancellor, the Archbishop of St Andrews,

Bisshop of Galloway, Halton,<sup>1</sup> Sir John Nisbet, (but he was not examined.) They declared they hard him confesse, and denied they knew any thing of the promise and assurance given him for his life. The pannell entreated the Chancelor to remember the honour of the family of Rothes, and to mind, that he took him by the hand, and said, "*Jacobe*, man, confesse, and as I am Chancelor of Scotland, ye shall be safe in life and limb." All the Chancelor returned was, that he hoped his reputation was not yet so low, as that what the pannell said, ather there or elsewhere, would be credited, since he had sworne. The pannell still averred the contrare. The Archbisshop, on oath, likeways denies any promise of life, saying, It was not in his power to grant remissions. Nicoll Sommer-ville the agent, brother-in-law to the pannell, boldly contradicted him, and bid him remember such and such tymes and words, and seemed to make his narration very probable. The Archbisshop fell in a mighty chaff and passion, exceedingly unbeseeming his station, and the circumstances he was then stated in, and fell a scolding before thousands of on-lookers. Nicoll yeilded in nothing; and after the Archbisshop had sworne, he cryed out, that upon his salvation what he had affirmed was true; which was to accuse the Archbisshop of downright perjurie: but it was overlooked, because *justum dolorem temperare non poterat*; and the misfortune was, that few there, but they believed Nicoll better then the Archbisshop. Then Sir George Lockhart and Mr. John Eleis, advocats for the pannell, produced ane Act of Secret Councell, bearing, that they revoked the assurance of life given him, because of his disingenuity. This the Duke of Lauderdale stormed at, and told he came in obedience to a citation upon his Majesty's letters of exculpation, to depone, but not to be staged for perjurie. The Justices repelled the said act as not probative, and because not produced *debito tempore* before the said noble witnesses were sworne; and because it was clearly redargued and convellid by the depositions of the Privy Councillors denying the same. Yet the princi-

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<sup>1</sup> See the Manuscript E. in 1681, pag. 212, wher Halton is accused of perjurie for deponing in this cause.

pall was written by Hew Stevinsone, margined and interlined in fundry places by Sir John Nisbet, the King's Advocat; and they abstracted the books, and would not produce them, *et magis credendum Clerico in actibus officii quam Judici*; and it choaked the principles of both criminall law and æquity to say it was too late, for *nunquam in criminalibus concluditur contra reum*, anie tyme before the enclosing the Affise. And it was thought strange they startled so at it, since they saw it and heard it before they came there; and it struck many with no small amazement to see that act denied by the Chancellor, &c., for it's generally yet believed there was truly such a thing; and it was freely talked, that if such tripping had fallen among mean persons, it would have been hyely censured.

And thus they hunted this poor man to death; a prey not worthy of so much pains, trouble, and obloquie as they incurred by it; and some of their oun freinds and weel-wishers desired they had never dipt in it, but only kept him in perpetuall imprisonment; for it made a wonderfull noice in the country, who generally beleived the law was streatched to get his neck streatched; and they feared preparatives: and satyres, and bitter verses immediatly flew abroad like hornets, in great swarmes, which ware carested, and pleasantly received; speaking much acrimony, and ane almost univerfall discontent. Sir George Lockhart defended him with admirable strenth of reason and expression; but he would not communicat counsell with Mr. Eleis, though commanded to it by the Lords; and some thought his late producing that Act of Secret Councell was ane oversight; others judged it a designe to entrap the Duke and the other witnesses, and to reflect on them. The debate<sup>1</sup> in the Adjournal books weill deserves reading, for it was one of the most solemne Criminall tryalls had been in Scotland thesse 100 years. Halton deponed that he confessed to him, he lurked that night, after he had shott the pistoll in Sir

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<sup>1</sup> [This Debate is given at length by Fountainhall in his MS. marked C; and is inserted, at page 281, as Appendix, No. III., in the volume of "Historical Observes of Memorable Occurrences," &c. printed for the Members of the Club. But the whole circumstances and allegations are here given in the text.]

A. Primrose (then Register) his yaird, with one Canon of Mondrogat, &c. He was but a simple, melancoly man, and owns the fact, (in the papers he left behind him,) as ane impulse of the Spirit of God, and justifies it from Phineas killing Cosbi and Zimmi, and from that law, Deuteronomy [chap. xiii.] commanding to kill false prophets that seduced the people from the true God. This is a dangerous principle, and asserted by no sober Presbyterian.

On the scaffold they beat drums when he began to touch the Chancellor. They say Major Johnston undertook to stop him, if he had attempted ane escape, or any had offered to rescue him. The Secret Councell would have given him ane reprivall, if the Archbishop would have but consented. Of his confession, whether judiciall or extrajudiciall, *vide supra Decembris 1674, folio 236 in calce, et 237*, wheiras the King's Advocat likewise libelled on the [4th] Act Parliament 1670, declaring the assaulting of churchmen to be death,—(for the A& in 1633 imposes only ane arbitrary punishment in such a case:)—It was answered, the said A& was posterior to the fact, which was done in July 1668, and so could not reach. Wheiron he passed from these two A&s as to death not being declaratorie laws, and insisted on the A& in 1600. (See many papers relating to this affair befyde me.)

It was judged ane argument of a bad deplorat cause, that they summoned and picked out ane assyffe of souldiers under the King's pay, and others who, as they imagined, would be clear to condemne him.<sup>1</sup>

A. fol. 315,  
No. 706.

11 *Januarij* 1678.—At Exchequer, Sir Jo. Nisbet was found liable in 4 lb. Scots yeirly as the castle-waird duety payable for the Castle of

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<sup>1</sup> The clerk of the Court, Mr Robert Martin, was desired to have been led as a witness, but the Justices waved him, being a member of the Court. There were objections against sundrie of the Assisiers, as *proditio testimonij vel potius judicij, &c.*

Doctor Irving and John Jossie were most unwilling to depone upon oath on the quality of the wound, alledging a priviledge or exemption to their profession; but they were not dispenced with, and it's like they had been imprisoned if they had absolutly refused. If he did not shoot the pistol, yet he deserved death, (as Mr. Hicks suggested to the King's Advocat,) because he boasted he was the doer of it, and that by David's decision, 2<sup>d</sup> Samuell chapter 1, ver. 16.

Dirleton, and contained in the chekher rolls. There was only 6 fchyres towards the south, and bordering on England, that had thesse castle-wairds. Dirleton alledged, Thesse lands, by Gowrie's forfaitor, being annexed to the King's croun, and thereafter given out to the Earle of Kelly free and without mention of any such duety, it was theirby discharged; which defence the Lords repelled.

24 January 1678.—This day the King's host at Striveling randevoused; A. fol. 316, No. 708.  
the Hylanders, Perthshire heritors, Militia of Angus, standing forces, &c., making upwards of 8000 men. Of their expedition to the West, of the Bond, Lawborrows, and other consequences of that affair, see a full account in another manuscript book, folio 167, *et seqq.*<sup>1</sup>

25 et. 26 Januarij 1678.—Thir two dayes ware wholly consumed almost A. fol. 316, No. 713.  
in the Inner-House, (yea they sate till one a'clock, which some affirmed unlawfull,) in advising the Duke of Lauderdale's action against the Earle of Tvedale, about the teyndes of Pinky, within the lordship and regality of Muslebrugh, in which there were three points; one of the tack, another of the hæretable disposition, if it was annexed property, and the third was, if it was præscriyved, since, in the English usurpation the Duke of Lauderdale was *nec valens, nec volens, nec potens agere*.

6<sup>th</sup> Februarij 1678.—Four Ægyptians, of the name of Shaw, were this day hanged, (the father and three sons,) for a slaughter committed by them of, one of the Eaws, (another tribe of thesse vagabonds, worse than the *mendicantes validi* mentioned in the Code,) in a drunken squabble made by them in a randevouz they had at Romanno, with a designe to unite their forces against the clans of the Brouns and Bailzies, that were come over, from Ireland, to chaffe them back again, that they might not share in their labors; but in their ramble they discorded, and committed the

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<sup>1</sup> Most of the Acts of Secret Councell this winter concerned this Western Expedition, which I omit here because collected elsewhere; as also the passages of Kilkerran and Doctor Lesly, which see *alibi*; *item*, the Act against Protections, *infra*, folio 321, in *ilce*.

forfaid murder, and fundry of them of both fydes ware apprehended. Thir four, being throwen all unto one hole digged for them in the Gray-frier churchyard, with their cloaths on, the nixt morning the youngeft of the 3 fones, (who was fcarce 16,) his body was miffed and found to be away. Some thought, he being laft throwen over the ladder, and firft cut doune, and in full vigor, and no great heap of earth, and lying uppermoft, and fo not fo ready to fmother; the fermentation of the blood, and heat of the bodies under him, might caufe him rebound and throw of the earth, and recover ere the morning, and ftial away; which, if true, he deferved his life, tho the Magiftrats or their bourreau deferved a reprimand. But others, more probably, thought his body was ftollen away by fome chirurgian or his fervant, to make ane anatomicall diffection on, which was criminall to take at their own hand, (*vide titulum de fepulchro violatō,*) fince the Magiftrates would not have refused it; and I hear the chirurgians affirme the toun of Edinburgh is oblidged to give them a malefactor's body once a-year for that effect; and it's ufual in Paris, Leyden, and other places, to give them alfo fome of them that dyes in hofpitalls.

On the 13 of Februar 1678, one of the Faws, called Robert Faw, being convict of having Killed one Young, a caird or tinker in Aberdene, was alfo hang'd tho the probation was very slender, the witneffes not deponing pofitively he was the very man; yet it was thought fufficient againft fuch cattle, for the being a known Egyptian is death by our A&S of Parliament. He dyed affirming he was not in the country the tyme of that murder; for they had been tane two years ago peiking, and fent away with the French officers, but returned. The reft of this tribe and band the Juftices banifhed the kingdom, never to returne under the paine of death.

A. fol. 321,  
No. 734.

About the 9 or 10 of March 1678, Mr. Patrick Home, advocat, perfhued Sir Androw Ramfay of Waughton, at Secret Councell, for debating his tennents of Fofterland from fifching at Auld-Cambus, and taking their boat from them. It might have been alledged (but it was fetled without a hearing) that what he did was warrantable, the faid Mr. Patrick having no right, but intruded himfelfe *vi clam et precarie*; that he had no way

to the sea but throw Sir A's ground, that he could not lay out his boat but upon his private harbory, and he had not as yet præscribed a servitude in ather. And he was content if Mr. Patrick did shew the leift right to fishing, then to restore him. Yet we say, *spoliatus ante omnia est restituendus*.

14 Martij 1678.—The Lords of Secret Councell declared the shieng to the Abbey should not defend any that ware owing to the King ather for excise, custome, feu-duties, &c. But if we please to goe farder, we shall find the Abbey of Halirudhouse was made a girth and sanctuary; because when the King was their in persone, it had been most improper their should be any disturbance by executing captions, &c.; since, under that pretence, traitors might convocat against his Majestie's oune person; *ergo, cessante ratione legis* it ought not to protect against the King's rebels when he is absent, and their is no such inhærent sanctity due to the place; and, upon this ground, is founded the ratio of the 173 A& of the Parliament 1593, against wounding persones in the King's oune palace or chamber, he being present. (Yet see this relaxed by the 1 of the Maccabees, 10 chapter 43 verse: see a 4to. law manuscript, pag. 46.)

A. fol. 321,  
No. 735.

Protections granted to debtors, called in law *superfederes*, and *re-scripta moratoria*, is another grievance; and my Lord Duke of Lauderdale, in Januar 1678, in peek that he was outvoted in a protection by Seaforth and Sir George Kinnaird, caused make a most strict and severe A& against protections; albeit he was told their was already one A& of Parliament in 1663 against them.

2<sup>do</sup> Maij 1678.—Two witches having confessed at Salt Preston, upon ane addresse, the Councell granted a commission to Prestongrange, St. Germans, and Colstoun, (for the Duke of Lauderdale excluded Mr. John Preston, as one inclined to burn too many for witches,) to try and judge thesse witches, who had confessed, but not thesse whom they delated and blackened. Thir two, on their confession, no wayes extorted, ware burnt.

A. fol. 322,  
No. 737.

28<sup>th</sup> May 1678.—ANENT THE CONVENTION OF ESTATES IN JUNE 1678.

[This Account of the Convention 1678, which concludes the folio volume marked as MS. A, has already been printed as the Appendix, No. II., in the HISTORICAL OBSERVES OF MEMORABLE OCCURRENTS, &c. By SIR JOHN LAUDER of Fountainhall, Baronet. Edinburgh, 1840, 4to.]

### FOLIO MANUSCRIPT E.

SOME DECISIONS OF THE LORDS OF SESSION, FROM JUNE 1678, TILL THE FIRST OF NOVEMBER 1683.

*Jurisprudentiæ antequam Christiana fuit, hæc erant eximia præcepta ;  
Honeste vivere, alterum non lædere, jus suum cuique tribuere.*

The folio law manuscript marked with the letter A, being now full, I begin heir at the Lords Decisions wher it left, viz. at June 1678.

See a continuation of thir Observes in another folio law manuscript marked A 13, beginning at November 1683, wher this book ends.

I HAVE marked the following Decisions only for my oun use, and some of them will not be understood so easily by those who ware not in the causes, for I have oft tymes, for my oun memorie, only set doune the interlocutor, without ather the case or the debate; in regard I ather remember wheirupon the interlocutor proceeded, or else I have somewhat of it observed in some other manuscript, or the Informations of it besyde me; not having leifure to be guiltie of repetitions; and thir imperfit memoires will serve as helps wheiron to draw them afterwards at lenth in mundo.

Their is also fundry Observes and Decisions of the Privy Counsell, Justice Court, and Exchequer, &c., with some Hiftorick remarks heir and their, intermingled shortly, because I have a folio Hiftorick manuscript apart.



## SUMMER SESSION 1678.

10 and 11 *Junij* 1678.—James Gray Litfter in Dalkeith was pannelled, E. p. 2, No. 3— found guilty, and sentenced to dy, for the slaughter of Archbald Morray, sone to the Laird of Neuton. The occasion of the quarrell was, in winter last, when the King's army was in the westren shires, Archbald was their as one of the King's life-guard; the Mid Lothian Militia regiment being also sent thither in March last, this James Gray was a lieutenant in one of the companies of that regiment. They drinking together one night at Glasgow, and being warme with win, they fell to words; James said a lieutenant to the Duke of Lauderdale was as good as to ryde in the King's guard; Archbald storm'd and call'd him a bafe fellow to compare himfelfe with gentlemen; and so went out together: and James Gray came back to the company, and being intoxicat with anger and drink, boasted I trow I have pricked him, but never imagined he had killed him. Being apprehended, the probation led against him was a boy of 16, and some other witnesses, who heard him emit that extrajudiciall confession that he had wounded him; as also thosse who ware at Archbald's buriall and saw the wound, *ut constaret de corpore delicti*, and the chirurgeon and others who saw the sword tane from the pannell, and that their was blood on it, and being compared with the wound and its orifice, (and the sword being present in Court,) they deponed the wound appeared to have been given with that same sword. Upon thir presumptions, the assyse found him guilty of the slaughter of the said Archbald. The pannell still denied it: some excused him as if he had truly forgotten. He was a pretty fellow, and was stout. Endevors was used for saving his life and banishing him. A bill given in to Secret Councell reprevied him for a moneth and recommended to the Lords of the Justiciary to reconsider the verdict, if it proceeded on rationall and just grounds: They say 5000 mks. was offered to the freinds in name of assythment, but report

being made to the Duke of Lauderdale, he refused to medle in procuring him a remission; so that on the 19 of July 1678, (after the poor man was put in some hopes of life,) he was headed. He died with more courage then could be justly expected from one of his education; he confest his vanity and pride, his mind ever aspiring to things far above his fortune and quality in the world, which engadged him in discontents, quarrells, &c., and which ware hightened and augmented by his marrieng ane old woman, &c. It was urged for him the confession proven was meerly extrajudiciall, and he was not presumed to be the agreffor, he being but a tradsman, and old, neir the age of 50; the other a gentleman, and young, and knowen to be ramp.

E. p. 15,  
No. 26.

20 *Jullij* 1678.—The Lords having this day advised the proces against James Dumbar, messenger, for paying the debt because he had suffered the Earle of Morton to escape, (see it in another manuscript at the 27 *Novembris*, 1677, *pag.* 7;) the Lords affoilzied the said James, because the employer, George Drummond, being present with the messenger, did not bring halberdiers from the toune's guard to assist the messenger, which he might have done, being within the toune of Edinburgh, and at the Croce, so neir to the court of guard.

20 *Jullij* 1678.—This day, at Exchequer, Kymmerghame's *jus mariti* of Ayton was gifted to the Earle of Home. See 6 of December 1677,

E. p. 15,  
No. 28.

24 *Jully* 1678.—At Secret Councill, books ware ordained to pay custome, as weell as other goods, in regard the tackfmen pretended they could not pay their duety, if they ware made free. Yet formerly they never payed, and yet the customers payed their tack duety; only they ware alwayes reclaiming. The Stationers have given in a petition at Secret Councill, seeking a rectification of this. The Councill, at the instance of the relict of Androw Andersone, who had the gift for so many years of being his Majesty's printer; discharged the other presses in Scotland for printing, except such as acknowledged hir; wheirof redresse is likewayes sought.

25 *July* 1678.—At Secret Councell, bailzies of barronies and regalities were ordained to take the Declaration, as well as bailzies of borrows-royall; albeit the 2d Act of Parliament in 1663, mentions only magistrats of borrows, which seemes to mean only borrows-royall, as *famofus analogatum ubi simpliciter exprimitur*, but they extended it also to the other. E. p. 17,  
No. 35.

27 *July* 1678.—One having taken two chartors from one who disponed lands to him, one to be held *de me* of the annalziar, another to be held *a me* from the disponer of his superior; and, being infeft both *a me* and *de me*, and having brought both his chartors and infeftments to a wryter in Edenbrugh to get the base holding confirmed by the Exchequer, the wryter, most ignorantly and ridiculously, confirmed the chartor *de me* and it's infeftment, wheiras the only right that ought to have been confirmed was only the base infeftment *a me*, which was null in itselfe and *de jure*, till it was confirmed and acknowledged by the superior. E. p. 18,  
No. 38. § 6.

30 *July* 1678.—At the end of this summer session, fundrie complaints were exhibited against Mr. John Hay of Hayston, one of the upper clerks of Session, upon malversation in his office, for getting him removed theirfrom. See it among my Session occurrents. E. p. 19,  
No. 41.

At the same time, Patrick Cockburne of Borthuick was sent for to be apprehended, being delated by one Thomas Rocheid, as having spoke basely of the Dutcheffe of Lauderdale.

Their was also criminal letters directed against Mr Thomas Urquhart, minister, as having had acceffion to Cromartie's death, who was *felo de se*. Not like Saull's armor-bearer, but rather like the Amalekite: See 1 Samuell, last chap. and 2<sup>d</sup> Samuell, 1 chapter.

5<sup>th</sup> *Sextilis seu Augusti*.—The Duke and Dutcheffe of Lauderdale parted from Edinburgh for London.

5<sup>th</sup> *Augusti* 1678.—Robert Nairne, fervitor to my Lord Strathuird, imprisoned and fyned in a 100 mks. by the Secret Councell, and that for beating and injuring William Crawford, servant to my Lord Advocat.

E. p. 19,  
No. 42, § 1.

9<sup>th</sup> 10<sup>th</sup> and 11<sup>th</sup> of September 1678.—At the Criminall Court, thir dayes are brought in the affairs following: *Imprimis*, M<sup>c</sup>Dougall of Garthland was pannelled for this treasonable expreffion,—“ That the King and the Duke of Lauderdale defigned to eftablifh arbitrary government, and that every true-hearted Scotsman was oblidged to oppofe their inbringing of the fame.” The dyet was deserted, but there is new letters raifed againft him. The reafon of the King’s Advocat’s not infifting, was faid to be, that the fervant of Mr. Row the minifter, who informed, was a litle tampered with, and pretended he remembered not what he heard, and yet he was a neceffarie witneffe. 4 *Novembris* 1678 it was again called againft Garthland, on a new libell; but nather witneffes nor affifers being prefent, the dyet was for the fecond time deserted.

2<sup>da</sup> One Temple, and one James Leirmont and his brother, ware all three pannelled, for being art and part of the murder of John Hog, who came with a part of the King’s forces from the Baffe in May laft, to diffipate a Conventicle met befyde Whyt Kirk, wheir the faid John Hog was killed by the Conventiculars; (vide *infra*, p. 325.) The Criminall Lords found it relevant againft them, to make them art and part of the flaughter, and guilty of death; that aither they ware prefent at the faid Conventicle wheir the man was killed, with a fword, piftoll, or other weapon about them; nather would they require that it fhould be proven that the fword was drawen, or the piftoll in their hand, but found it fufficiently relevant that they had fuch weapons about them, becaufe they ware *in actu illicito*; they ware prefent at a feild Conventicle, which the laws of the kingdome hes declared, to be rendezvouzes of rebellion, and fo, *verfabantur in exercitio rei illicitæ*, and became answerable for the enormities that followed. Or 2<sup>da</sup> found it relevant that they ware prefent, though they wanted weapons, if fo be they ufed thir or the like encouradging words to their ounge party before the flaughter was committed:—“ Doe not fear, we are far above their number; fee their be no cowards here to-day; and yee that hes armes, and are on horfeback, goe to the foirfyde:” And fand the uttering of fuch words, ware ane acceffion as airt and part to the fubfequent murder, and æquivalent to a mandat and command. By the probation it appeared, that Temple was there prefent with a fword under

his arme, but it was not drawn. And it was proven againſt James Leirmont, that he was their upon horſeback, and that he rode up to the King's party that came from the Baſſe and North Berwick and viewed them, and then rode back to his ounge party again, and uttered to them the forſaid words. But it was likewayes proven that the ſaid James had no weapons, but only a wand in his hand; that one Cowan killed the ſojor, by thruſting his halbert in his belly, and that he lived ſome fix howers after, and then they ſaw him dead, and was at his buriall. This was proven, *ut conſtaret de corpore delicti*; (ſome thought the wound might have [been] cured, if a chirurgian had come in time,) and that James, the tyme of the ſlaughter, was at ſome diſtance from the place wheir the ſlaughter was committed. Notwithſtanding of all which, he was execute for it. The Affiſe being enclouſed, one Bull, a wright, was elected their chancelor, and the firſt verdi& they returned was, that they found them guilty of being preſent at a feild Conventicle; but the Advocat, the Archbiſhop of S<sup>t</sup> Androis, and the Juſtices, being very diſſatiffied with this impertinent returne, they were commanded back, and reinclouſed (after they had gone abroad) to amend their verdi&. The ſecond tyme they came out, adhering to the former. They were thruſt in the third tyme, and threatned by the Advocat with an Affiſe of Error if they corrected not their verdi&. At laſt they returned by their verdi& that they ware both guilty. Wheiron the Juſtices ſuperceeded ſentence againſt Temple till November; and it's thought they deſigne only to baniſh him; but James Lermont they ſentenced to be headed at the Graſſe Mercat on the 27 of September; which was accordingly done: ſee the copie of his ſpeech.

The two branches of the Juſtices interlocutor, alarumed many, and gave great occaſion of diſcourſe, as being thought ane terrible ſtreatch of what formerly was eſteimed law, and a great ſhake to the ſecurity of mens lives and fortunes, and a moſt arbitrarie deciſion. And as to the firſt part of it, our law concludes all it finds with cold ſteile (that is, with a drawn ſword) in their hands, guiltie of the ſlaughter; but that the being caſually preſent *ubi in rixa homicidium eſt commiſſum*, and having a ſword or piſtoll, but not drawn, was ſufficient to inferre art and

part, was *inauditum* till now. For what if it be a man that uses never to goe abroad, or ryde, without a sword, as all gentlemen, and even burgers and the better sort of tennents use to doe, shall that make them liable and guilty? But the knack wheiron they justified this decifion was, that prefence at a Conventicle, which is *locus et actus illicitus*, with a sword or other weapons, though he be not *in actu proximo*, and threatning with them, was acceffion enough, if homicide happened there. And the State defigne of the interlocutor was, to discourage all field Conventicles, but especiallie to fright them from coming to them with weapons; for by this interlocutor, if a man be killed at ane Conventicle, if five hundred be their with swords about them, without any other acceffion but their naked prefence with weapons, they are all guilty of death. But if a man fall in accidentally amongst them, in armes, but had no purpose of being present at the Conventicle, or for hearing the sermon, but curiosity drew him to see what it meant, I think such a prefence as that being proven, would affoilzie him from the guilt. As to the acceffion of being present where a murder is committed, see it elegantly reasoned in my other folio Manuscript in October 1674, in Setone of Carriston's case, its *numero* 450, and folio 235, *et seq.* As to the 2<sup>d</sup> part of the interlocutor, which concerns Lermont, 1<sup>o</sup>, It was thought the words wheiron he was found guilty, might weell have admitted another sence and interpretation; and that all he meant was allenarly, that they might capitulat to get of Mr. John Rae the minifter, and themselves, and not that he incited them to offer the leift violence and offence, especially since it was fully proven the slaughter was done by another; and in crimes *probationes debent esse luce meridiana clariores*, and words are not to be streatched, but rather to be impropriated, *ad evitandum delictum*, and that his *anteacta vita* spoke him to be of a peaceable temper, and the words ware dubious, and might admit a favorable sence, and *odia sunt restringenda et dolus in maleficijs non præsumitur, et animus et propofitum* is what makes it criminall, which seemed not to be heir; besydes words importing command should be very clear: yet see Mckeinzie's Criminalls, pag. 144, what they sustained in David Hamilton's case; and heir also it might have been alledged that the principall slayer should be discuft before the accessories,

yet the contrare was found by the Justices in March 1671, in the case of Charles Robertstone and his two sones; see it in Mck's plaidings, pag. 207 and 220, item in my collection, 9 *Martij* 1671, folio 94, *et seq.*: and heir the dittay was not raised against the principall, nor was he present, but had fled. The other thing complained of in this procedor was, that the assisers were twyce or thrice enclosed, though they had brought out their verdict, which seemes contrare to the 91 A& of the Parl. in 1587; and accordingly on the 30 of July 1677, in the case of one Cunyghame, cook to the Earle of Kinghorne, the Lords refused to reenclose the Affise; Yet if assisers should returne ane inept and unformall verdict, why should they not be reenclosed to mend it? see Mck. *supra*, pag. 504, *vide infra*, page 40.<sup>1</sup>

*Eodem*, 9, 10, *et* 11 *Septembris* 1678.—Thir dayes eight or ten E. p. 21.  
 witches, all (except one or two) poor miserable like weemen, ware pan- No. 43.  
 nelled, some of them brought out of Sir Robert Hepburne of Keith's lands, others out of Ormiston, Crichton, and Pantcaltland parishes. The first of them ware delated by thesse two who ware brunt in Salt Preston in May last, and they divulged and named the rest, as also put forth seven in the Lonhead of Lefwaid; and if they had been permitted, ware ready to fylle by their delation fundry gentlewomen and others of faschion; but the Justices discharged them, thinking it ather the product of malice, or melancholy, or the devill's deception, in representing such persons as present at their feild-meetings, who truely ware not there. Yet this was cryed out on as a praelimiting them from discovering thesse ennemies of mankind. However, they ware permitted to name Mr. Gideon Penman, who had been minifter at Chrichton, and for fundry acts of uncleanneffes and other crymes, was deprived. Two or

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<sup>1</sup> Now, by the act and proclamation of Secret Councell, dated 13th May 1679, the being in armes at field Conventicles is declared treason, (for the Councell cannot make treason,) and that conforme to the 83<sup>d</sup> Act, and Act 75 Q. Mary in 1563, the 5<sup>t</sup> Act in 1661, and the 2<sup>d</sup> Act in 1662, and the other laws discharging the convocating the leigdes in armes; which Knox, in his History, shoves was objected to him and to the Lords of the Reformation, and he answereth it *libro* 4<sup>ta</sup>, page 368, *et seqq.*

three of the witches constantly affirmed that he was present at their meetings with the devill; and that when the devill called for him, he asked, wheir is Mr. Gideon my chaplain? and that ordinarily Mr. Gideon was in the reer in all their dances, and beat up thesse that ware flow. He denyed all, and was liberat upon caution. They declared and confessed the first thing the devill caused them doe, was to renonce their baptisme; and by laying their one hand on the top of their head, and the other on the sole of their foot, to renonce all betuixt the two to his service: That one of them was at the tyme with child in fornication, and, in hir refignation, shee excepted the child, at which the devill was very angry: That he lay frequently with them, and kissed them, but was cold, and his breath was like a damp air: That he cruallly beat them when they had done the evill he had enjoyned them; for he was (said they) a most wicked and barbarous master: That he adventured to give them the Communion or Holy Sacrament, (I remember in 1670 we heard that the devill appeared in the shape of a minister in the copper-mynes of Sweden, and attempted on the same villanous aperry:) the bread was like wafers, the drink was sometymes blood, and other tymes black mosse water: That he preached, and most blasphemously mocked them, if they offered to trust in God, who left them miserable in the world; and nather he, nor his sone Jesus Christ, ever appeared to them when they called on them, as he had, who would not cheat them: That sometymes he transformed them in bees, in ravens, in crows, and they flew to such and such remote places; which was impossible for the devill to doe, to rarefy the substance of their body unto so small a matter. Some thought he might take away their spirit and convey it to thesse places, leaving their body behind, but this ware to give him the power of resurrection of the dead; for death is nothing but the removal of the soull from the body, which being once done, it's not in his power to reunite them; so that all he deludes them by, is in representing such and such ideas, shapes, and objects to ther fancy and imagination when asleep, and in our sleep we will have very lively conceptions of things; only in thesse diabolique transports their sleip is so deep, that no pinching will awake them scarce. Thir confessions made many intelligent sober persones stumble much what faith was



to be adhibite to them. Ther is a storie told of one who, in King James the 6t's time, was proceffed as a witch, becaufe a Scotsman being troubled with a difeafe in Italy, and craving a magician's help and cure for it, he was told he needed not have come fo far from home, for their was one in Scotland could cure it, and gave him his marks. After fome years, being returned, on the bridge of Erne, he met one to whom all the marks did quadrat; to whom having imparted the cafe, he cured him by application of fome fimple herbs. This coming abroad, he is accused of necromancie, and compact with Satan, and found guilty, though he alledged that the cure was naturall, and he would teach any of them to doe as much; and that the devill's naming him could not make him guilty, elfe it fhould be in his power to ruine and deftroy the moft innocent and godly perfones. As for the rencountre betuixt Mr. Williamfone, fchoolmafter at Couper, (who hes writ a grammar,) and the Rosicrucians,<sup>1</sup> I never trusted it till I heard it from his ounne fone, who is prefent minifter of Kirkcaldy. He tells, [that] a ftranger came to Coupar, called for him; after they had drank a litle, and the reckoning came to be payed, he whiftled for fpirits. One in the fhape of a boy came, and gave him gold in abundance. No fervant was feen riding with him to the tounne, nor enter with him into the innes, &c. He caufed his fpirits againft nixt day bring him noble Greek wines from the Pope's cellar, and tell the frefcheft news then was at Rome; then tryfted Mr. Williamfone at London, who met the fame man in a coach neir to London Bridge, and who called on him by his name: he marvelled to fee any know him their; at laft he found it was his Rosycrucian. He pointed to a taverne, and defired Mr. Williamfone to doe him the favor to dyne with him at that houle; whither he came at 12 a'clock, and found him and many others of good fafhion their, and a moft fplendid and magnifick table, furnifh't with all varieties of delicate meats, wher they are all ferved by fpirits. At dinner tyme they debated upon the excellency of being attended by fpirits; and after dinner they propofed to him to affume him unto their fociety, and make him participant of their happy life; but among the other conditions and qualifica-

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<sup>1</sup> See a litle of Rosicrucians in a 4<sup>to</sup> historick manuscript, marked A. 3, *pagina* 50.

tions requisite, this was one that they demanded, of his abstracting his spirit from all materiality, and of abandoning and renouncing his baptismal engagements. Being amazed at this proposal, he falls a praying, whereat they all disappear and leave him alone. Then he began to forthink what would become of him if he were left to pay that vast reckoning, not having so much on him as would defray it. He calls the boy, and asks what was become of these gentlemen, and what was to pay? He answer'd there was nothing to pay, for they had done it, and were gone about their affairs in the city. Some said he was left in a jacks, but this relation above named, his son, affirmed to be of truth. As for appearances, by which the devil has actuated dead bodies and made them move, see of Cornelius Agrippa and many others, some very odd stories recorded by Del Rio, in his *Disquisitiones Magicæ*, though Gab. Naudæus, in his Apologie, endeavors to wash Agrippa's face very clean, and to justify both him and the rest from the imputation of magick. Their was on or two of them that denied, and so were set at liberty; nine of them upon their confession, (and so seemed very rational and penitent,) were sentenced to be strangled and then burnt, which was shortly after execute upon five of them between Leith and Edinburgh, and the other four were burnt at Painston<sup>1</sup> near within their own parish where they had lived. The Secret Councill gave a commission to Sir John Nicolson, John Clerk of Pennicuick, John Johnston of Polton, and Mr. John Preston, Advocate, to judge these seven who were defamed for witches in the Lonhead, whom I spoke with.

*Eodem*, [10 Septembris 1678.]—At Secret Councill on Catharin Liddel exhibited a complaint against ——— Rutherford, baron bailzie, to Morison of Prestongrange, and against David Cowan in Tranent, bearing that they had seized upon his ane innocent woman, and had defamed him as a witch, and detained him under restraint as a prisoner; and that the said Cowan had pricked him with long pins in sundry places of his body, and bled him, and tortured him most cruelly. The defences were, that

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<sup>1</sup> There is a hollow still called the Witches Syke. E.

shee was dilated by other witches, and that *mala fama laborabat*, and was theiron apprehended, and yet so kindly used as not to be thrust in any public prison, but keip't in a private house; that shee and hir sone-in-law consented that shee might be searched, *et sic volenti seu consentienti non fit injuria, neque dolus*, it being desired for the manifestation and vindication of hir innocency. As for the pricker,—1<sup>o</sup>, He learn'd his prentifship and trade from one Kincaid, a famed pricker. 2<sup>do</sup>, He never came unsent for, because he was ather called by Shireffs, magistrats of borrows, ministers, or bailzies of barronies; so what he did was *authore prætore*; and so *velle non creditur qui obsequitur imperio Domini, et non est in dolo qui judici obtemperat*. 3<sup>to</sup>, The trade was not improbat or condemned, by any law amongs us; and so, not being *prohibitum*, it was *de genere permissorum*. 4<sup>to</sup>, All divins and lawyers who wryt on witchcraft, as Perkins, Del-Rio, &c., acknowledge their are such marks, called by them *stigmata sagarum*; whey, then, may their not be ane art for decerning, and distinguishing them from other marks in the body. 5<sup>to</sup>, *Error communis facit jus*. The Councell may restraine that way of tryall for the future, but most pardon byganes. Answered, 1<sup>mo</sup>, Denyes consent. 2<sup>d</sup>, None can validly consent to their oun torture; for *nemo est Dominus suorum membrorum*.—As for the pricker, he was a cheat, and abused the people for gain; and the Chancelor remembred, that he had caused imprison that Kincaid the pricker, in Kinros, for abusing the country their. The Lords of Privy Councell first declared the woman innocent, and restored hir to hir good name and fame, and ordained it to be publicly intimat the nixt Sunday in hir parosh church. They reprooved Rutherford, the bailzie, for his rashnesse, and discharged him to proceed so heirafter; and found that no inferior judge, much lesse a baron bailzie, had power to apprehend, or incarcerat, or detain any of the King's liedges under restraint, upon the pretence of their being delated or suspected as witches, but that they most immediatly intimat it with the first occasion, ather to the Lords of Privy Councell, or to the Lords of the Justiciary, and obtaine their warrand for the taking them. As also, found they might not use any torture by pricking, or by withholding them from sleep, &c., but reserved all that to themselves and the Justices, and thesse who acted

by commiffions from them. And as a mark of their difpleafure againft the pricker, they commanded him to prifon, their to ly during their pleafure.

P. 24, No.  
45.

*Eodem 10 et 11 Septembris 1678.*—Their is a ryot perfhued by Meinzies of Pitfoddells, and dame Anna Semple, lady liferentrix theirow, againft Mr. James Thomefone of Arduthie, for a ryot committed about their marches. The Lords having tryed by witneffes, found their was a ryot, but superceeded any fentence theirown till the civill part ware difcuffed before the feflion, where they had mutuall declarators of propertie depending.

P. 24, No.  
46.

*Eodem die.*—Alexander Innes, merchand in Aberdeen, gave in a complaint againft the Magiftrats of that toun for oppreffing him, by fyning, by imprifoning, clofing up his chop, and declaring his burges ticket woid. The toun had a counter-libell againft him, complaining of his infolence in refufing to difcover his head before the Magiftrats in face of Court, tho he was no quaker, and in ftrring up fedition and mutinee among the citizens, representing that the Magiftrats, fince the King's reftoration, had lifted upwards of 200,000 mks. of the toun by way of ftent, and applyed it to their privat ufes, whereas they ware alwayes ready to compt and fhew their burgefles how profitably it was beftowed on their minifters, hofpitals, &c.—their common good being moft inconfiderable; fo that their was a neceffity for yeirly taxing the toun, and they denyed that in ftenting, they confidered Mr. Innes for his import, and then burdene him again for the fame goods when he retailed them. The Lords approved the procedor of the Magiftrats in every point, and ordain'd Mr. Innes to enter his perfon in the tolbuith of Aberdeen within 10 dayes, and their to ly during the Magiftrats pleafure. This was done to encouradge and ftrenthen the hands of governement, efpecially when the oppofition they met with was for adjusting the proportions of the King's affeffment laid on by the laft Convention of the eftates.

P. 25, No. 47. *Eodem die.*—At the Criminall Court, a poor woman called Knox was pannelled for having committed adultery with one Stevinfon, a tennent in Strabrock, and who confefled the adultery, and that fhee bore

a child, and that it lived 36 or 40 howers, and then dyed, and that shee earded and buried it at the end of the said Stevinsone's barne, and the dogs senting the child, had pulled it out of the hole, and ware offering to tear at it and eat it, wheirby it came to be discovered. The King's Advocat infisted against hir likewayes for the murder, in so far as shee bore the child privily, and called no help of weemen, which shee might have gotten. 2<sup>do</sup>, The man Stevinson told hir shee behoved to conceall it, else he was broken, and *de facto* he had fled. 3<sup>do</sup>, Shee denyed it aliment, and so *necabat*. 4<sup>to</sup>, Shee acquainted none with its death or buriall. Upon thir presumptions the assyse returned hir guilty both of the adultery, (which was only of a free woman with ane married man, yet it was alledged criminall praetiques had extended our Acts of Parliament even to that case,) and of the murder of hir child; which seemed hard, since they had only hir oun confession for all, and used no other mean of probation, and so in law it should not have been divided to hir prejudice, since ingenuity is to be presumed in on part of it as weell as in another: Likeas, in a woman of Dyfert accused of adultery and killing the child, the conjectures ware stronger against hir then they are against this woman, and yet the assise would not find hir guilty of the murder: (See it in the other manuscript at June 1676, it's folio 245 *et seqq.*) And also the Justices, in the late case of the St. Johnston woman, who was accused of killing hir child, took most strict notice of the marks and nips ware on the child's neck, and referred it to midwives and phyficians to try if it was for strangling, or only got in the pangs of labor. The Lords of the Justiciary ordained this woman to be hang'd, which was done some few dayes thereafter.

27 *Septembris* 1678.—This day, Mr. John Paterfon, Bischop of Gallo- P. 25, No. way, was admitted, and sworne one of his Majestie's Privie Councill. He <sup>48.</sup> is the first Bischop a counselor since the King's Restoration, tho their ware Archbischops on the said Councill. And at Exchequer, the Earle of Morray was admitted and receaved one of the Lords Commissioners of the Treasaurary, being superadded to the other seven; and both ware done upon speciall letters from his Majestie for that effect.

P. 25, No.  
49.

*Eodem die.*—Sir George Maxuell of Newark was imprifoned in the tol-buith of Edinburgh by the Secret Councell, becaufe, in ane infolent manner, he had refufed to take the declaration in the meeting of Renfrew thire for choicing a collector of the prefent affeffment. After he was neir out of the bar of the Secret Councell, Sir George put on his hat, for which the Chancelor called him back of new, and fharpely rebuked him for offering that which the beft fubje&t ought not to doe: He excufed it with inadvertency; however, it made him ly in prifon longer then otherwayes he would have done, for he was not liberat till the 10 of October; at which tyme he gave in a bill, and they fent in to the prifon to fee if the fubfcription was his, and then called for him, and upon his craving pardon, and making a fafhion of kneeling, he was fet at liberty.

P. 26, No.  
50, § 1.

9<sup>mo</sup> *Octobris* 1678.—Richard Maitland of Over Gogar, eldeft fone to my Lord Halton, is this day admitted and fworne of the Privy Councell, conforme to the King's letter theiron.

§ 2.

This day, Mr. Charles Home, brother to the Earle of Home, for his acceffion in the clandestine marriage of the aireffe of Ayton to the Laird of Kymmerghame, and in difobeying the Councell's orders, and for not appearing, was imprifon'd in the Caſtle, he having no fortune wheirin to fyne him, and, after two dayes, was, at his brother's interceffion, liberat.

§ 3.

*Eodem die.*—Eight mo[re] Conventiculars ware sentenced to goe to his Majeſtie's Plantations in America, or the Indies, becaufe they would not depone upon the libell exhibited againſt them, bearing their reſſetting the intercommoned miniſters, and aſking who ware preſent with them, as they are enjoyned by the 2<sup>d</sup> A&t of the Parliament held in 1670. Their is neir eighty prifoners all ſentenced to be ſent to Barbadoes, and only are detained till a ſhip be got to tranſport them.

P. 26, No.  
51.

10 *Octobris* 1678.—The Earle of Argile, this day at Secret Councell got a commiſſion for two companies of Hylanders, to be commanded by Lawers and Collonel Meinzieſ as their captains, and for a commanded

company out of the Earle of Lithgow's regiment, that they may put him in peaceable possession of the Ile of Mull; and if the Maccleans and other Hylanders offer resistance and opposition against them, then they granted him a commission for fyre and sword. It was alledged this could not be directed against them, because the Maccleans had a standing suspension undiscuss'd, and till that took a termination, they were under the security of the King's laws. It was answered, it was the Macclean's fault that had not called that suspension. Yet it seems Argyle was as much to blame in the delay, since he might have discuss'd it either by a protestation or a decret. It's thought Argyle's sone's marriage will work out the affair against Macclean.<sup>1</sup>—See the printed proclamation and A& made on this day, for securing the peace of the Hylands, intended to gratify Argyle's designe; as also the A& at the same time made, discharging any to travell with no persons then their domesticks in the Hylands, conforme to the old A&s of Parliament.

6<sup>th</sup> *Novembris* 1678.—Three witches brought from Falla parish, were P. 27, N. 54. condemned at the Criminall Court to be burnt, upon their judicall confessions.

7<sup>th</sup> *Nov<sup>r</sup>* 1678.—Upon a bill given in to the Lords of Privy Councell, P. 28, N. 56. by Harie Barclay, baxter, against the Lord Forrester, they ordained the said Harie his debt, it having been for bread, and so alimentarie to be excepted out of the said Lord his personall protection, that it might not defend against his debt instructed by bonds and decreets.

20 *Novembris* 1678.—The good Toune of Edenborough *contra* Mr. Thomas Lermont, Advocate, and the remanent members of the Colledge of Justice, for their Annuities. Tho this cause took up 4 or 5 dayes pleading in the Inner House, and the fame of it spread wide, yet I shall contract it, because the minutes of the debate are to be had, and are pretty full. I shall only touch some few of the heads I made use of, in

E. p. 31,  
No. 66.

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<sup>1</sup> See of this in the other manuscript the end of Julle 1676, folio 256, in *calce* et 257.

deducing the charge, and point at the rest of the debate. It was alledged for the good Toune, That they judged it their misfortune to contend with so powerfull ane adversary as the Colledge of Justice ware ; (for the Lords had only commanded Sir George Mckeinzie, King's Advocat, and my selfe, to be Advocats for the Toune,) but the justice and piety of the cause, was what ballanced thesse disadvantages: That the cause was founded in religion, for the sustenance of their ministers, for whom all nations, even the very heathens, had made by nature's light, honorable allowances ; and it is no more but just, that they should participat of our temporall things. The good Toune, with much satisfaction, had its gates alwayes open to receive in gentlemen's sones, and others, who came from all the parts of the kingdome towards this illustrious society, and were no lesse glad to see them arrive at so great improvements of their fortunes. That by a bountifull reciprocation, like the circulating of the blood in our weins [veines], she, as a kindlie mother sends furth hir colonies back to the country again. Entreats them to remember Menenius Agripa's apologue, by which he reduced the commons of Rome from their Aventine secession, by his witty demonstrating the bad consequences issued from the discord betuixt the belly and other members of the body ; (see this *alibi*.) It's hoped the lawyers, who are the priests of righteousness and oracles of the nation, will not practise a *societas Leonina*, which they condemne in all other cases. They will not take a share in the benefit of the gospell, and cause the Toune bear all the burden *quem sequatur commodum*, &c. It's true, the teyndes are the proper and naturall patrimony of the church ; (A& 10 in 1567,) but wheir they cannot be had, then the *decimæ personales ex artificio et industria resultantes*, and the *cædium pensiones* succeed in place theirow, as in brughes ; which leads us in to speak of the annuities, a moderat and easie duty imposed upon the house maills, for help towards the ministers stipends. The severall wayes how ministers ware payed, from tyme to tyme, within the Toune of Edinburgh, since the Reformation was publickly ouned in 1560, was heir at lenth related, the historie wheirow was gathered from the summarie of the Toune of Edinburgh's statutes besyde me. Then was represented what was the present settled and constant revenue and fonds, out of which the Toune payed



their ministers, and how much short it fell,—that they were forced to encroach upon their common good, to make up the deficiency,—and that they now wanted the bishoprick of Orkney. Then the Towne's charge was urged, from the Act of sederunt of the Lords of Session in 1637, whereby the Advocats and other members of the Colledge of Justice consented and bound themselves to pay that annuity at 5 per cent. It was represented,—This was no clandestine act, nor any deed of the Towne's, but standing recorded in the Lords of Session's books; that *nudæ verborum emissiones in stipulationibus* were not regarded, but suspected of levity, they not carrying so clear an impression and conviction of a fixed designe to bind: but heir was an act done with much deliberation, gravity, and seriousness, before the Lords, the supreme judges ordinar of this nation;

. . . The next remarkable step in this progresse is the Act of Parliament *anno* 1649; and though it be a 49 Act, and sweep't away by the rescissorie one, yet it gives a morall reason of everlasting verity to it, viz: that none can withdraw or seek to exeeme themselves from the provision of ministers, without contracting great guiltiness before God; and of the justice of which Act the Parliament, in 1661, were so convinced, that they renewed it; and upon that Act does the good Towne likewise found. And the Colledge of Justice may be so kind as to consider, that much of the Towne's debt is contracted upon their accompt; for their accommodation, they had built that noble fabrique of the Parliament House, and reered it on the place where the ministers houses of old did stand, being St. Giles's Church yaird; they built the Tron Church; brought in the water by conduits, &c. To whom were they doing it? were they not making freindship thereby for their own souls, if this expression may be pardoned, as somewhat popish? Is it not to the citie of our solemnities, our metropolis and capitall, the *communis patria* for citations and confirmations; erected in a royalty *a tempore antiquissimo*; adorned with many glorious concessions of our kings; complemented with badges of royalty and parcells of the soverainety, as scarlet robes, a scepter and sword; the cheiff magistrate made his Majestie's immediat deput and lieutenant, and ordained, by his Majestie's own ranking, to take the precedencie, within the Towne's liberties, of all subjects whatso-

ever, nixt to yourfelfe, my Lord Chancellor. That this incorporation (like all other things,) was very inconfiderable in its commencement; and when the Advocats ware not above 10 or 12 in number, it was reasonable to encourage them with priviledges. When they ware in ther fwadling cloaths it was charity: but now to continue theſſe fictitious and imaginarie priviledges of theirs, when they are turned ſo potent and formidable, is what will choak the common reaſon of mankind. . . .

The ſpeakers for the Colledge of Juſtice ware, Sir Androw Birny, Dean of Faculty, Sir George Lockhart, Sir John Cunynghame, Sir Robert Sinclair, and Sir John Dalrymple, who repeated their reaſons of ſuſpenſion; and alledged, That commonwealths, in all ages, had ever honored Advocats with the higheſt marks of reſpect; . . . . That the wiſdom of our anceſtors had not been wanting in this, but had cumulat it with many encouragements; That the ſeſſion is very old, being erected by King James the I., by the 65 A& of his 3<sup>d</sup> parliament, in 1425. That, at the 2<sup>d</sup> modell and conſtitution of the Seſſion, in King James the 5<sup>th</sup> tyme, their priviledges are again ratified to them, by the 68 A& of his 5<sup>th</sup> parliament held in 1537, called the King's good mind anent the Lords of Seſſion; and tho the priviledges their indulged ſeime only *per expreſſum* to be given to the Senators, yet that's only a *ſynecdoche partis pro toto*, and the reſt of the Colledge of Juſtice are all included in the Lords priviledges by participation and communication. So great hes been the care our Parliaments hath had of this auguſt colledge, that they have met ſometymes to doe noe other thing but to ratify the priviledges of it; for in Quean Marie's 2<sup>d</sup> Parliament, their is only one A&, and it is in favors of the Colledge of Juſtice. And in the Parliament held in anno 1593, their are tuo A&s in that one Parliament ratifieng the priviledges of the Colledge of Juſtice; and their is ſcarce any Parliament that hath not look'd upon this as one of the great intereſts and concernes of the nation. And the 279 A&t of the Parliament held in 1597 is remarkable, not only that it exeeme the Colledge of Juſtice from the præſtation of ather the *munera perſonalia* or *onera realia* within brugh; but alſo it expreſſy mentions ſome who lived within brughs at their ounge liberty, nathing knowing the Magiſtrats in kirk nor policy. And from all thir, inferred that the

Toune's exaſting annuity from them was an unlawfull and irregular impoſition, contrare to the generall laws, and derogatorie in particular to their immunities and exemptions from all taxes, impoſitions, &c., (of which ſee Hope in his larger praſtiques, Tit. of the ſeſſion.) And that they were founded in a clear law, viz. a printed publiſt A& of Parliament, in 1661, ratifieng all their priviledges, in the moſt ample forme that can be deviſed. Then they answered to the A& of federunt, in 1637, That 1<sup>o</sup>, it was a ſimulat, clandeſtin, patch't up A&, the penult day of a ſeſſion, and diſclamed by the moſt eminent lawyers after. 2<sup>do</sup>, It is not binding nor obligator, nather upon themſelves nor their ſucceſſors. Not upon themſelves, becauſe not ſubſcryved: and, in 1661, the Lords could not ſuſtain a judiciall A& to prove one's conſent without his oune ſubſcription, in the caſe betuen Oſburne and Buchanan: nather can it bind their ſucceſſors in the office; becauſe, albeit they are a collegiat body, yet this is not in law the *habilis modus* to bind a corporation, ſo as to make the obligation to deſcend, it not being in any affair depending on the nature of the univerſity; and it being in *materia odioſa*, introducing a burden, it could not be without a preceeding warrand under their hands, to authorize the ſaid ſurrender, and to remaine for a laſting monument and inſtrument of their ſlaverie. As for the A& of Parliament in 1661, bearing a ratification of the impoſition of the annuity, and ordaining it to be payed by the members of the Colledge of Juſtice, as weell as others; they answered, No reſpect was to be had theirt; becauſe it was only a privat and unprinted A& of Parliament, never red, debated, nor voted, but paſt amongs the ratifications; altho it is pretended that Sir John Gilmor, then Preſident of the ſeſſion, took it up and amended it in ſome particulars; and theirtor it clearly falls under the A& *ſalvo jure cujuſlibet*, and moſt ſtoop to the publiſt law in that ſame Parliament, ratifieng the priviledges of the ſeſſion: and Sir George Lockhart urged much from the words of the A& *ſalvo jure*, in the Parliament 1633. That the Toune is ill adviſed to contend with them, from whom they derive much, both of their grandeur and wealth. And if the Seſſion deſerted them, tho only for a while, it would expoſe them not only to penurie, but likewayes to contempt.

To this it was answered for the good Toune of Edinburgh,—That they

were far from envying the flourishing and prosperity of the Colledge of Justice,—great and happie might they be,—part of the Toune's concerne being wrap't up theirin ; but it behooved to be cautioned and qualified, as the acclamations to Pompey ware in Rome,—*Sit salva hujus civitatis libertate potens*. It is not fitt the Seffion should, like a diseased splen, grow to big for the body ; that would discompose the wholle politique frame. For ought we can know or conjecture, every gentleman's family in Scotland, that hes mo sones than one, ar designing them to follow the profession of law ; in the nixt generation the most part of the inhabitants of Edinburgh shall be members of the Colledge of Justice ; ware it reason that they should plead immunity from the ministers stipends, or that the far lesser part of the inhabitants of the toune shall bear the wholle burden theirow ? Why doe not members of the Colledge of Justice, by this same very rule, refuse to pay any stipend in the places of the country wheir they have interest ? if they have a priviledge, why does it not defend them *ubique* ? But this is a meer begging of the quæstion, and is *gratis dictum*. Let them produce us one scrap of a pen for this so boasted a priviledge of theirs ; shew us but wheir it stands recorded, and we shall yeeld up the wholle cause. The mistake is fundamentall, the error is in the first concoction ; they presuppose and beg a priviledge, wheiras their is no such thing in *rerum natura*. If they say the Act of federunt 1637 mentions their exemption by the Secret Councell, the same is a narrative, framed by the lawyers themselves, to give a rise and cullor to that A&, and is *funditus* convellid and redargued by the books of Secret Councell produced, bearing the direct contrare, and ordaining all to pay annuity. *Qui fundat se super privilegio debet id docere*. 2<sup>do</sup>, The ministers being in possession of their annuities, even from the members of the Colledge of Justice, are in the case of *regula cancellariæ apostolicæ*, that *triennialis et decennalis possessor non tenetur docere de titulo in beneficialibus*, but his title *præsumitur* ; and which, as it is unanswerable in law, so few or none of these gentlemen standing at the bar can or will deny but they have quietly acquiesced in the aid A&, by paying their annuities to the Toune's collectors till of late. Wheiras it's alledged the A&s giving priviledges to the Lords of session comprehends all the dependers and retainers, I crave pardon to

differ : for, besides that statutes moſt be underſtood ſtri&ly, and *ſecundum literam*, upon peruſall of the ſpeciall priviledges their enumerat, they will be found to be intransmiſſible and incommunicable, *et non egredi perſonas Dominorum*. And, *eflo* they were included, exemption from taxes or impoſitions would not reach this, for annuities is no ſuch thing. . . .

All their branling is not able to ſhake themſelves looſe of the A& of federunt. Thir gentlemen would be very angry if I ſhould deny them to be a faculty and incorporation, veſted with that ſame power to enter into pa&ions and contra&ts that any other collegiat meeting is. Now, in other ſocieties doe we not ſee that their oune a&ts binds them. As an a&t of the Toune-Councell of Edinburgh makes the Toune and the ſucceeding Magiſtrats liable for the debt theirin. (See Durie, 22 *Decembris* 1626, Peibles *contra* Toune of Perth.) If your Lordſhips of the Seſſion ware to renounce your woddet right of the Cannomilnes, needed their any more but a judiciall a&t? If the conſent and ſubſcription of every one ſhould be requiſit in ſuch a caſe, collective bodies ſhould never come to ane expedition of their affairs; for remeed wheirof, they ather bind themſelves by their a&t, or a ſyndic conſtituted by them. And Osburne's caſe meets not, for their the judiciall a&t was made up *ex intervallo ſuper remiſcentia judicis* : And doe we not all know, that the appending the ſeall of the priory and metropolitan church of St. Androis ſerves for a ſufficient ſymbol of the conſent adhibit in the adminiſtration of the deeds of the biſchopric, without any ſubſcription? Whereas they would thruſt the Toune's A&t of Parliament, for their annuities in 1661, out of doors, becauſe the Colledge of Juſtice priviledges are likewayes ratified at the ſame tyme. It is answered, That the a&t of annuities is both poſterior to theirs, and does comprehend the ſpecifick caſe controverted, and hes determined the members of the Colledge of Juſtice ſhall be liable, and ſo moſt derogat from their generall ratification, which expreſſes no priviledge at all, but in the bulk; and it is unqueſtionable if the Parliament had been demanded, whither they intended by that generall ratification to exeeme them from this annuity, but the legiſlators would have answered *negative*. And the 165 A&t in 1593, poſitively diſcharges that no private A&ts of Parliament prejudice miniſters livings. Nather is this A&t of

Parliament, ratifieng the annuities, ane private A&, nor does it fall within the compas of the A& *salvo jure*. For it is not the printing or not printing of ane A& of Parliament that renders it ather privat or publict, but its the subje& matter and universality of its extent or fan&ion. And the Lords of Seffion are intreated to cast their eyes on a decifion registrat by Dury, at the 10 of December 1622, the Earle of Rothes against Gordon of Halhead, wheir the Lords found ane particular A& of Parliament (wheir their was no ambiguitie refulted from the interpretation of it) fell not within the A& *salvo*, and that the Lords had no power to decide whither it justly or unjustly so statuted, but the same ought only to be tryed in Parliament. See also Dury anent the A& of Parliament rehabilitating F. Stewart of Coldinghame; and Hadington, in his pra&iques *anno* 1611, tells, the Lords sharply reprooved ane advocat for debating the legality and justice of ane A& of Parliament. So that the Lords will find they are not empowered to medle with this A&, much lesse to goe over its belly and annull it. And it is with no small averfion that they contend with the Colledge of Justice; but they cannot be otherwayes answerable to that faithfulnessse required of them, they being only curators, overfiers, and adminiftrators of the Toune's priviledges, and none of which they have power ather to tranfa& or give up, being difenabled by the 112 A& of Parliament in 1587, discharging brughs to dispose on their liberties without consent of King and Parliament. Wheirunto it was replied, for the Colledge of Justice,—That they needed not instru& a priviledge, because as to immunity from burdens, they are founded not by priviledge, but *jure communi*. . . . . As for the possession the Toune hes, 1<sup>o</sup>, It's violent, by illegall poindings. 2<sup>do</sup>, The lawyers, what they give of that kind towards the sustentation of the minifters, will pay it as a benevolence; not as a debt that can, *ex necessitate juris*, be extorted. And, if the Toune will passe from their compulfitors, the Colledge of Justice will very chearfully contribute and affist. And yet thesse gentlemen, the minifters, who deserve their stipends very weell, needs not be anxious that any thing will be deducted of their stipends, (as the Toune of Edinburgh threatens them, if the Colledge of Justice annuities be taken from them.) For 1<sup>o</sup>, All thesse who ought to have the name of the Colledge of Justice, viz. Lords, Ad-

vocats, Writers to the Signet, and Clerks, (excluding ordinar Writers, Nottars, Messengers; Lords, Advocats, and Writers men; Clerks of Exchequer, &c.) their annuities will be within 1200 mks. by year, as, after tryall and calculation was found. 2<sup>do</sup>, The Colledge of Justice offers to ferme the annuity, and other rents the good Toune hes mortified and allotted for their minifters, and pay their wholle 12 minifters compleatly theirwith, that their fhall be no deficiency; fo that, of neceffity, their hes been ather malverfation or negligence in the bygain adminiftration of it. Wheir it is pretended that this annuity is not an impofition, and fo not comprehended in the A& exeeming from impofitions, it's defired they may give it another name. . . . The A& of federunt in 1637 can never be fufficient, without a confent in wryt, to entaill that fervitude; nather will ane naked a& of ane Toune Councell bind a debt on the Toune, or a judicial a& of the Lords, renoncing any wodfet they had for fecurity of their mortified moneyes, oblige them; but, in both cafes, their behooved to be a prævious a& fubfcrived for the warrand of both. The instance from the common feall of St Androis, in place of the chapter, fignifies meerly *ex infituto*, and in vigor of a fpecial ftatute. (See 4 *Novembris* 1671, E. of Louthian and minifters of the Presbytrie of Jedburgh againft the Toune of Edinburgh, about the Ladie Yefter's mortification.) Befydes, they had very pregnant reafons to think this A& of federunt was in 1643 paff from by the Toune; for they had scrolls of a&s under Mr. David Heriot advocat his hands, and other memorandums, bearing, that the Toune had reftricted the faid a& of the annuities, in fo far as concerned the members of Seffion, to 5 years; and they had exhibition depending for recovery of the principalls, and craved the Toune of Edinburgh might be fo ingenuous as to exhibit their publi& a&s and records, (which the Toune did, but nothing was found in them to fortify their alledgeance :) which might give light to the truth; and that in 1658, the Colledge of Justice had obtained a decreet of declarator of their priviledges againft the Toune; but the fame was now loft, or abftracted, and not booked.

Then the lawyers repeated the heads and articles of their prefent declarator they had depending againft the Toune, viz. 1<sup>o</sup>, Exemption from annuities. 2<sup>do</sup>, From all jurifdiction, civil or criminal, that the

Toune might not be their judges in any case. The King's Advocat seemed to yeeld, that the Toune should only have *imperium* over them in case of ryots committed in vacation tyme; for, in session, he thought the Lords ware only to be applyed to in such cases. Some thought this too large and Cassandrian a conceffion, for it pleased nather party. 3<sup>to</sup>, The Colledge of Justice craved to be declared free from paying the small dues at the ports for their goods and plenishing brought in or out, which, by the Toune's gift their of, are destinat to mending and repairing the hy wayes and avenues leading to the city, which is a publi&t good. 4<sup>to</sup>, Craved that it might be found lawfull for them to keep taylors, mafons, or other craftsmen, tho unfree, within the brugh, to work their work in their oune houses, without disturbance or moleftation, or being feized on, and their work confiscat by the trades of Edinburgh and ther deacons, on the pretence of their priviledges contained in their severall fealls of causes, which seime contrare to publi&t utility. 5<sup>to</sup>, That they may have convenient seats in the churches for hearing fermon; and that the meanest burgesse may not be preferred to them, as hes been hitherto done, in competitions; and heir, when it came to a commoning, they craved the Hy cathedrall church to be appropriat for the Lords of Session, and the rest of the Colledge of Justice, and to have their oune minister, and they would pay him; but the Toune of Edinburgh cannot part with any patronage within their bounds, in the undoubted right whei of they are stated. 6<sup>to</sup>, That in imposing of stents by the Toune's oune authority they be absolutly free. And, as for thesse laid on by Parliaments and conventions, that according to the a&ts of the Toune Councell of Edinburgh, and particularie that in 1660, the Colledge of Justice may have some of their number present, that they be not unæqually assessed and burdened for their lands. 7<sup>to</sup>, That the imposition of 2 pennies upon the pint of ale may, conforme to the contract betwixt the good Toune the Colledge of Justice, and the shire of Mid-Lothian, be manadged with common consent; and that the Toune may exhibit their compt books of that chamber, to the effect it may appear whither it hes been applyed to the right use, for paying of and defraying the Toune's debts, or if it hes been inverted. See, of thir particulars, many things scattered up and doune in other collections besydes me.



*Nota.*—The mortifications the Toune sets apart for their minifters stipends are, 1<sup>o</sup>, The annuity, which commonly is roused, about 11,000 mks.; 2<sup>do</sup>, The rents payed for the seats in the church, roused to 3600 mks.; 3<sup>do</sup>, Their old kirk-rents, being mortifications and ground annuells due to the chaplanries and altarages of S<sup>t</sup> Geills collegiat church, amounting to 3000 mks.; 4<sup>o</sup>, The merk upon the tun of all goods imported at Leith, set to 3400 mks., making in all litle more then 20,000 mks. Wheiras the Toune (without ever past memorie having got a charge of horning, or bein pershued,) payes 27,000 mks. per annum to their minifters. Another complaint of the lawyers was, that the Toune's Collectors poulded their houses summarly, without suffering the 15 days of the charge to expire before the poulding, as the Act of Parliament in 1669 requires.

The Prefident declared, the Lords would hear no other points till that of the Annuities ware first determined.

21 *Novembris* 1678.—Mr. James Daes, Advocate, is conveyened before the Lords of Privy Councill, for some expreffions against his Majesty's Government; such as calling a Dragouner a knave, and that no honest man would take him to that employment, which he alleged was of robbing his orchard. P. 38, No. 68.

*Item*, The other expreffions anent Polwart's imprifonment, which see *alibi* in another manuscript, together with the sentence against him, its pag. 142 and 146; it was objected against one of the witneffes adduced for proving the libell, that he was infamous and had a remiffion for adulterie: the man confest it to be true at the bar. Yet the Councill received him *cum nota*.

3 *Decembris* 1678.—A poor woman was this day pannelled at Criminall Court for murdering hir child. The affise, after they had been abroad all night, ware the nixt day, by command of the Criminall Lords and instigation of the King's Advocat, reinclofed to mend their verdict, which seimes contrare to the 91 A& of Parl. in 1587; yet its thought they may be reinclofed *ex incontinenti*, (but not *ex intervallo*,) if they returne ane inept verdict. P. 40, N. 72.

P. 43, N. 86. 14 *Decembris* 1678.—At Criminall Court, the Justices by ane A& declared they would repell in all tyme coming this objection against a witnesse, that he was ane informer, and that they would receave him notwithstanding their of; for who shall dete& crymes but they who know of it—and surely in law every information given of a cryme should not cast the informer, unleffe it be such partiall counsell as to advise and encourage one to raise a proces on the hopes of his bearing testimony; yet Sir G. Mackenzie in his printed Criminalls, page 461, argues against this, and the 50 A& of the 3<sup>d</sup> Parliament of King James the I. seemes to condemne it.

P. 44, N. 91. 20 *Decembris* 1678.—One Alexander Traill, a messenger and nottar in the toun of Kirkcaldie, is conveyened before the Secret Councell, by one James Thomefon, who complained that Traill had falsely filled up his oun name in some blank rights that ware consigned in his hands as wryter; and also complained of his craving 500 mks ere he would give them up to the partys concerned; and when he had got it, he still boasted and threatned that he had yet other blank bonds lying over their heads ungiven up, tho he sayes now he was only in jest. The Lords on the 2<sup>d</sup> of Januar 1679, laid him in the irons till he should exhibit thesse other papers; and having lyen their till the 23 of Januar thereafter, he then receaved sentence, viz. for his malversation in his office, they deprived him of his office of being ather a messenger or nottar, and for his deeds of oppression, fyned him in 100 lb. Scots, and ordained him to ly in prison till he payed it.—Messengers extortioners are ordained by our A&s of Parliament, and particularly A& 33 in 1469, A&s 83 and 88 in 1587, to be punished as oppressors. *Oppressio est concussio et vis five publica seu privata.*

P. 45, N. 96. 3 *Januarij* 1679.—At Exchequer, fundrie merchands are perswued by Milne and the other fermors of the King's customes, for entring their goods uncustomed, and stealing the King's customes; and for bribing and corrupting the waiters at the ports and elfewheir to let them passe. Alledged, that by the 12 A& of the Parliament held in 1669,

they cannot be pershued at all, if they be not conveyened within 3 moneths after the alledged abstracting or concealling; and if they dwell 12 miles from Edinburgh, they cannot be conveyened before the Exchequer, but only before the judge of the jurisdiction wheir they live. Replyed, that is all true if the pershuit ware for imbezilling, but heir it is *super jure communi* for brybing. The Lords of Exchequer repelled the defences, and admitted the libell to probation, and which was worse, found the waiters who had receaved the bribes, and so ware accessorie and guilty; yet that they might be receaved for witnesses, because it is ane occult cryme, and could not otherwayes be got proven.

9 *Januarij* 1679.—This day a letter red about the outed Advocats from No. 99, p. 47.  
the King, which see in my Session occurrents.

13 *Januarij* 1679.—At Criminall Court, Alexander Todridge, keeper No. 107, p. 48.  
of the park of Halirudhouse, is pershued by one Din, for refetting some sheep stollen from him by one Morison. We caused raised ane exculpation for Alexander, he having truely bought the said sheep at the West Port, which is the ordinar sheip mercat, and represented, 1<sup>o</sup>, That Alexander was a man of known honesty and integrity; 2<sup>do</sup>, Had no acquaintance with the seller; 3<sup>tho</sup>, So soon as he was informed theirow, he caused imprison him, and Dun, pershuar, transacted with him and let him out; 4<sup>tho</sup>, The principall theiff most be first discusst. . . . The pershuars deserted the dyet against Alexander, in respect of his apparent innocence.

*Eodem die*, [16 *Januarij* 1679.]—At Secret Councell, Josias Johnston, No. 111, p. 49.  
merchand in Edinburgh, fyned in 500 mks. and imprisoned, for causing apprehend one Naper of Buchaple, by mistake and in respect of likenesse, instead of one Henderfone, who had stollen some cambrick from him the day before, and who was a common theiff. And the toune officer, John Thomson, because he seized upon him without having a warrand from a magistrat, (as he ought first to have had,) they sent him to prison, and ordained the hangman the nixt day, at 10 a cloack in the forenoon, to take

him to the trone, and their to stand for ane hower with a paper on his brow, and then to be deprived of his office, and banish't the toune; which was thought a severe reparation of the gentleman's honor.

No. 122, p.  
52.

23 *Januarij* 1679.—At Secret Councell, Patrick Hay, Proveft of Perth, (he had voted againft the D. of Lauderdale in the laft Convention of Eftates in June 1678,) 8 Bailzies, and 7 Councillors, are declared incapable of bearing office within the laid brugh for 3 years, becaufe they had contemned ane former fentence of the Councell, in fo far as they had made one Blair, their Proctor-fifcall, and Dean of Gild officer, albeit both thefe perfones had been formerly declared by the Secret Councell incapable of bearing any office in Perth, becaufe of their acceffion to a tumult raifed againft Proveft Threipland, (and yet fome thought thir employes given them ware not fuch publict trusts as the A& of Secret Councell feemed to feclude them from,) and ordained the reft of the Toune Councell of Perth to make a new ele&tion on the 4<sup>t</sup> of February nixt, and the Earle of Strathmoir to be prefent with them to fee it orderly done: and yet Proveft Hay's fa&tion prævailed in this new ele&tion.

No. 123, p.  
52.

*Eodem die.*—In ane ryot perfhued by one Cruikfhank againft James Gordon of Seton, both of them merchands in Aberdeen; the Councell fand James Gordon, the firft aggreffor, and theirfor fyned him in 400 mks: fee thir parties in another manuſcript [D] at the 24 of July 1678.

No. 124, p.  
52.

*Eodem die.*—In the wrongous imprifonment and oppreffion perfhued by George Young, late bailzie in Winchbrugh, againft Mr. John Hay, ſhires-depute of Lithgow, and Mr. Androw Ker, his clerk, the Lords found the libell relevant, and proven by the defender's oune anfwers, as much as might infer ane arbitrary puniſhment; in fo far as Woodcockdail confest their was fuch ane a& in their ſhire diſcharging any inhabitants of the ſhiredome to perfhue before any other Court except themſelves, and the comifars; and they fand it ane abſurd A&, and præjudiciall to regalities, (and yet it is knownen that feveral Courts and judicators in Scotland makes fuch Acts,) and that he juſtified and de-

fended the fying of George Young in 50 lb. Scots on that A&, and his imprisoning him upon that A&; theirfor, they rebuked him publi&ly, and ordained him so soon as he went home, to raze the said A& out of the Shireff Court books, and fined him in 100 lb. Scots, to be given to George Young, for his charges and expences. The libell concluded deprivation against the clerk, upon the 81 A& of Parl. in 1540, imposing that penalty on clerks that refuse the extra& of instruments taken in their hands. In this cause, the Councell was displeased with George Young; because in purging the witnesss of partiall councell and money it appeared they had got, wheiras, 1<sup>o</sup>, it's safer to give witnesss nothing till after they have deponed; and, [2<sup>do</sup>,] tho the party may lawfully bear his witnesss expences, yet heir George had given some of them 2 dollars, which was thought exorbitant, albeit they had attended severall Councell dayes, and refused to come in without; yet a caption could have forced them.

28 *January* 1679.—At Secret Counsell, one Maxwell pershues one No. 137, p. called Zuille, as he who had circumveened and falsely deceived him, <sup>56.</sup> after they had agreed to cancell a minut of the sale of some lands, he only sent him a copie, which he having torne as if it had been the principall, he thereafter got a charge of horning upon the principall. The defender alledged he sent him only a copie to show him the tenor of their agriement. The Lords after tryall found the matter wholly civil, (which seldome they doe or decline themselves,) and referred it to the judge ordinar the Session, (for the pershuar had of purpose tabled it heer hoping for quicker dispatch than at Session,) and fyned the pershuar *tanquam temere litigans* in 100 mks., and in 2 dollars for each witnesss expence, and ordained him to goe to prison till he payed it. This pershuar wanted friendship.

*Eodem primo Februarij* 1679.—W<sup>m</sup> Gordon, agent, was imprisoned by No. 144, p. the Lords, in regard of this indiscreet expression in a bill he gave in for <sup>58.</sup> his brother against Pitmedden, in the affair of the daughters of Seton of Blair, viz. that they might not be overhaled, but get a share of that justice the Lords uses to give to others.

No. 147, p.  
58.

4 *Februarij* 1679.—Marion Weir, prisoner in the tolbuith of Edinburgh, and sentenced to be hanged on the 5<sup>th</sup> of Februar, for murdering a child borne by hir in fornication, did this morning about 4 or 5 a clock of the morning, make hir escape out of the said tolbuith, by cutting some of the stanchells and iron graits by *aqua fortis* on the window in the uppermost story towards the Hy Street, and coming down upon tows; other 3 weemen escaped that same way with hir, viz. one that was in for debt, and one Smith a midwyfe, and hir servant woman called Scot, in upon the suspicion of having murdered a child, of which see more *infra* the 10 of March: but the midwife fell and broke hir leg, and both shee and hir woman ware got again, and afterwards condemned and execute; but Marion Weir hes hitherto escaped. It was judged a bold and daring attempt for weemen, for the height was formidable, but life is sweet. The keeper was to blame in suffering *aqua fortis* and ropes to be conveyed in, and not having keepers ather in the same rounge or neir hand.

No. 152, § 3.  
p. 59.

7 *Februarij* 1679.—When one would take the possession from a wodfetter upon the 62 or last A& of the Parliament held in 1661, he should offer caution befyde his oun bond, and he should wairne the wodfetter 40 dayes præceeding Whitsonday to remove in the same way as one would doe with his tennent.

No. 160, p.  
62.

20 *Februarij* 1679.—At Secret Councell, the Earle of Glencairne perswades his brother's reli&, now Lady Robertland, for ane aliment of hir joynture of 8000 mks. *per annum*; and Sir George Lockhart alledged for him that all lifrents should be *salva rei substantia, Lege 1, D. de usufructu*, and not ane absorbing and annihilating of the fee as is heir. Answered, he had ane pension from the king, and many of the debts on that estate are contracted since the establishment of the right of hir joynture, and so thesse debts could never be a just nor legall consideration to abate of hir moderate joynture, being but 7000 mks. by year, and shee being a person of greater quality, one of Duc Hamilton's daughters, and brought ane opulent portion, and by marrieng a gentleman shee had committed no disparagement. And wheiras the Lords gave the Earle of Morray ane

aliment of his mother, their was *dispar ratio*; for befydes hir being a prodigall, their was *jus naturæ*, thee was his mother, and so *ex æquitate*, bound not to see him want; but heir the Ladie is ane absolut stranger to the Earle, pershuar, and bound by no rule to aliment him. And when the Marquis of Douglas craved something of the Lady Stranaver, his mother-in-law, (which is nearer than a sister-in-law,) the Secret Councill refused it.

24 *Februarij* 1679.—This day, one Mitchell was banished by the Cri-<sup>No. 163, p. 63.</sup>  
minall Lords.

25 *Februarij* 1679.—At Secret Councill, the Lady Torwoodhead per-<sup>No. 167, p. 64.</sup>  
shues Jean Hodge, wyfe to Florence Gairdner, for a ryot in poinding upon a decreet standing suspended, and for tying the pershuar's servant woman hand and foot; their was much debate upon the relevancy of the anfwers that ware made.

27 *Februarij* 1679.—Sir William Ker, Director of the Chancery, having<sup>No. 171, p. 65.</sup>  
turned out Mr. W<sup>m</sup> Hog, one of the wryters their, pershues him for opprobrious language, taking away the registers, &c., and Mr. William pershues Sir W<sup>m</sup> for illegally depriving him, he having given him 1200 m<sup>ks</sup>. for it. The Lords of Privy Councill referred to the judge ordinar to consider the commensuration between the delict and punishment, if it merited deprivation, yea or not; and *medio tempore*, during the dependance suspended him *ab officio*, and ordained him to crave the Councill and the said Sir W<sup>m</sup> pardon, for calling the said Sir William, his master, capricious, tho many thought the character true. . . . .  
*Vide* more of this *infra*, page 118, [N. 316, Hog reponed N. 782.]

28 *Februarij* 1679.—Robert Grahame, Provest of Dumfries, a man in<sup>No. 172, p. 65.</sup>  
great reputation for wealth as a drover, being brok, this day his escheat is gifted to the Earle of Dundonald, the Prefident Craigie, &c., *primo loco*, for the payment of their debts. They also got the gift of the recognition of his lands, which he had made to recognosce, by taking a bafe

infettment after he was bankrupt, which will occasion a pretty debate in the declarator of recognition, whither or no such a fraudulent deed can make the lands recognize so as to prejudice his creditors; and if this will fall under the compas of the 18 A& of Parliament in 1621, he could not have dispoed validly then; *ergo*, nather lose them by delinquency *tantum contrahendo quantum delinquendo*. *Vide infra* the nixt page *in calce*. Many will be great losers by him.

No. 173, p. 65. *Eodem tempore*.—John Cunyghame of Entrakin's chaplain was per-  
shued before the Secret Councell, and Entrakin craved to be fyned in regard he was not licenced by the Bisshop of the dioceffe, as the 4<sup>t</sup> A& of Parliament in 1662, *in fine*, requires. And if this extends to schoolmasters.

No. 174, § 1. p. 65. *Eodem tempore*.—The Lords of Privy Councill fyned Sir William Fleeming of Ferme, Comisar of Glasgow, in 4000 merks, for his wife's going to conventicles; but declared, since the husband should not suffer for the wife's fault, that if shee survived hir husband, then his airs should retain as much as he payes of fyne, together with the annuel-rents theirow from the payment, and that out of the 1 end of hir joyn-ture; which will be a check on wyves zeall or their inclination to wrong their husbands, if they ware so malicious; and does not punish the husband *ob delictum alienum*, which is not in his power some-tymes to coerce; and if shee dy first, then makes hir executors liable. But what if shee have none, or it be the husband, or hir ounie children; however, this is ane extension of the 5 A& of Parliament in 1670, mak-ing husbands liable for their wyves going to conventicles, and borrowed from æquity. *Quæritur*, If a father by that A& be fyned for his children, or a master for his servants, what redresse hes he of their portions or fees.

No. 175, p. 68. [28 *Februarij* 1679.]—I was concerned this Winter Sessïon in many other caufes that deserve to be marked, but waving their debate, I shall only name some of them. 1. George Young and James Allan, Wryter to the Signet. 2. Edward Gilespie against Ratho, John Muire, and James Grahame. 3. Thomas Wilson against Weitch, Robert Young, and Tor-



phichen, and Broun the cook. 4. James Thomfone againſt Robert Sanders, printer. 5. Mr. Hew Fork, Shireff-clerk of Renfrew, againſt my Lord Regifter. 6. Goldy againſt the Toune of Dumfreis. 7. John Montgommery againſt De Waux. 8. Thomas Broun againſt Dumbar of Baldune. And a great many others, which are all to be ſeen in the informations theiſe beſyde me; and in the former practiques, I have only marked the interlocutors in the moſt of them, becauſe I have the debate beſyde me in ther bills and informations.

5 *Martij* 1679.—The Lords of Exchequer this day paſſed the gift of <sup>No. 176, p. 68.</sup> the lifrent eſcheat of the Lord Forreſter in favors of Hew Wallace, Wryter to the Signet, and he being payed, affigned the remanent and ſuperplus profit of the gift to Edward Ruthven, ſone to the rebell, as creditor to his father, who had intrometted with the E[arle] of Bramford's eſtate, belonging to the ſaid Edward, and that by a ſpeciall ſignator theiſe from his Majeſty. The objections againſt this gift ware, 1<sup>o</sup>, That, *non conſtat*, that Hew Wallace or Edward Ruthven ware creditors. 2<sup>do</sup>, It invited the rebell to confume his ſone's means, for it boor what he ather had or ſhould intromet with, belonging to the ſaid Edward. 3<sup>to</sup>, It was dounright againſt the 145 A& of the Parliament held in 1592, annulling gifts of eſcheats given to the rebels' barnes, and to the Lords decifions, D. 25 *Junij* 1622, Borthuick's. 4<sup>to</sup>, It was null and ſimulat, being impetrat by the rebell's oune moyen and means: ſo found D. 26 *Junij* 1622, Inglis donator to Ochiltrie's eſcheat, *infra*, page 84 and 82.

7 *Martij*.—At Privy Councell the Lady Ballegernie, and Captain <sup>No. 177, p. 63.</sup> Tyrie, hir huſband, give in a complaint againſt Poury Fothringhame, and Hay of Pitfour, *tutor teſtamentar*, craving the cuſtody of hir oune daughter, who was one of the 2 airs portioners to Gray of Ballegerno, albeit the mother was married, becauſe the child was but 9 years old, and very tender and ill uſed, and not provided with medecines and other convenience, and fretted while abſent from hir mother, and offered to entertain hir gratis. Answered, The tutor was præferable at all tymes, but eſpe-

cially the mother being remarried, and the offer of alimenter gratis was repelled in the case of Collonel Fullerton, and the Lady Towie and hir 2<sup>d</sup> husband. This seimes ane od pershuit.

No. 178, p.  
68.

8 *Martij* 1679.—At Criminall Court, a poor coilziar woman, brought from Borroustounesse, was sentenced to be hanged for murdering hir child, borne in fornication, by cutting of it's head, and wrapping it in hir courcheiff. She confest the same, and was execute.

No. 179, p.  
68.

10 *Martij* 1679.—One Smith, a midwife, and Scot hir servant-woman, are condemned to be hanged, for murdering a child wheirto shee was called as midwife: all the probation was only pregnant præsumptions against them: As to the conjectures if the child be borne dead, and the præsumptions of its being strangled or not, see *Diodorus Tuldenus* in his *Jurisprudencia extemporalis*, pagi. 92, et seqq. And it ware to be wished that we had such a statute made with us, as I find they have in England, viz. A<sup>o</sup> 27, anno 21 *Jacobi* 1. *Regis*, viz. that it shall be murder for the mother not to call for help, or to conceall the death of hir bastard child; which would prævent exceedingly the destroying of children, if thesse violent presumptions ware once made enough, vide *supra*, page 25, in the case of one Knox. What added to thir 2 their guilt was, they had broke the prison with Marion Weir; (*de quo*, vide *supra*, page 58;) but flight imports but litle; and it was urged from the Advocat's oun Criminalls, *titulo* 26. *de Fractura carceris et fuga* page 223, he calls them *levia indicia*. The mother of this child, called Hendersone, was banish't Edinburgh, and whip't, because, (though shee was free of the murder, and cryed oft for hir child) shee seimed to prævaricat as to the father of the child: shee had been servant to Mr. James Cunyghame, wryter.

No. 180, p.  
69.

12 *Martij* 1679.—This day, by order of Privy Councell, their is a strict search made throw Edinburgh (the ports being closed) for Mr. John Kae, and thosse others who had wounded Major Johnston, and the other souldier who dyed theirot, and for intercommoned ministers. And one Barclay being taken, escaped out of the court of guard; and my

Lord Lithgow's fogors ware brought in upon the toun, which was judged a great infringement of the toune's liberties. The Councell emitted fundry proclamations, and commanded all non-conformed minifters relict's, or wyves, to void the toune, and all strangers to give up their name to the conftable nightly, &c.

3 *Maij* 1679.—The Archbifchop of St. Andrews, Mr. James Sharp, No. 181, p. 69. murdered at mid-day, being Saturday, by 10 or twelve men, within two miles of St Andrews. It was ane barbarous a&: He was in his climaterick. Some laid the remonftrant Prefbyterians ware his murderers; others laid the blame on the Jefuits: (fee the printed papers on either fyde.) Cardinall Beton was alfo killed in the moneth of May. (So Knox in his Hiftorie, p. 71 & 72.) Saturday had been fatall to him; on it Mitchell made his attempt, &c. Buchanan, in the life of King William, lib. 7, p. 239, fhows what feverity he ufed on Harald Earle of Orkney and Cathneffe, for cutting out the Bifchop of Cathneffe his tongue, and thrufting out his eyes. He caufed emafculate and geld him and his wholle pofterity, and then hanged them. Lesley, in *vita Wilhelmi*, tells us the Bifchop's name was *Sanctus Gilbertus*.—This is the firft Proteftant Bifchop murdered in Scotland. Hamilton, Archbifchop of St Androis, was, in 1570, hanged by order of law. The Secret Councell met on Sunday the 4<sup>th</sup> of May, and emitted ftrict proclamation for discoverie of the murderers. (Of the execution of Hackfton of Rathillet, one of the murderers, *vide infra*, 30 July 1680, pag. 160.) Craig *Feudorum*, pagina 102, tells of another Bifchop of Caithneffe boiled by the people for exa&ing the teinds. The Donatifts, or Circumcellians, beat a holy Bifchop called Maximianus with clubs to death. Lipeloo and Grafius in *vitis Sanctorum* tomo 4, on the 7 of November, tells of a holy Bifchop of Coloigne called Engelbertus, murdered anno 1225 in a manner very like our Archbifchop; it's p. 442.

14 *Maij* 1679.—By a letter from the King, five Privie Councillors are No. 182, § 1. called up by him to London, to clear the pretended hostile laws, as the Militia A&, &c., and to a conference anent my Lord Lauderdale's a&-

ings.—They ware the President, Advocat, Register, Justice-Clerk, and Justice Generall.

- § 2. One Mr. John Spreull in Glasgow, upon suspection, was brought before them; and because he shifted to call it the *murder of the A. Bischop* and to tell who lodged with him the night following, he was threatned with the boots, but at lenth he satisfied them.
- § 3. Mr. George Scot of Pitlochrie and his cautioners fyned in the wholle 10,000 mks. for breaking his confinement at his oun house; but superceded the exacting of 7000 mks. of it till they saw his future behaviour. I mention none of the A&s of Councell heir, because I have them all in print.
- § 4. *Eodem die*.—Hamilton of Bankreiff pershues Mr. James Henderfone, wryter, for cancelling and destroying some principall papers wheirof he got a fight at a meeting, and for nipping the subscriptions from them. This was not proven against him.

No. 183, p.  
70.

3 Junij 1679, Tuesday.—President Stairs being at London, the Lords, according to their custome, and the warrant given them by the 93d A& of the Parliament in 1579, elected my Lord Goffuird Vice-President. Some thought Colinton or Strathuird, as the oldest senators, might pre-fide, conforme to the 93 A& of the Parliament held in 1540. Others, that the King might name one to supply the President's absence, as was done in the 42 A& of the Parliament in 1537. 2<sup>do</sup>, Their being but ten Lords, (wheirof one behooved to sit in the Utter House,) the fulnesse of the quorum was doubted, because of the 57 A& in 1537, appointing that to a quorum their shall at leift be in every federunt 10 Lords, with the President or Chancelor, (for the 4 extraordinar Lords make no part of the quorum, so that 5 or 6 Lords with them could not a&,) but custome hath prævailled, since that 9 makes a quorum, as being the major part in *numero impari* of 15. If a sentence ware prononced or advised, and voted by fewer then 9, (as I know severall such done in the Lords afternoon meittings,) I think they may be quarrelled and reduced as prononced *a non habentibus potestatem*; for at most they ware but like to a Committee, and could only prepare a report against the nixt day to the

full number : but none hes yet adventured to quarrell thesse decreits upon this nullity. Vide the other manuscript, 1<sup>o</sup> *Junij* 1677.

*Eodem die*—John Williamfone, shiref-clerk of Perth, was pannelled before the Criminall Court for usurie ; wheirof, having raied an exculpation, the Advocat-Depute not being readie to infist, and urging to have the dyet continued, the Lords deserted the dyet simpliciter ; which imports that no new letters shall be raied, but upon speciall notice of the Lords and upon a bill. And this in respect it's but a statutorie crime, the dyets in criminalls are peremptor, and that few or none of thesse proceses for usury have hitherto taken effect, or the perones bein convi& : See the informations in this cause, and the Advocat's criminalls, *titulo* Usurie. No. 184, p. 70.

4 *Junij* 1679.—At the publication of a proclamation of Secret Council over the mercat croce of Edinburgh, against the rebellion and insurrection in the West, their fell out some difference betuixt the Macers of Privy Councell and the Pursevants, whosse names should be first red and insert. Some think the Poursuivants have the precedency, and that it is but within thesse few years that the Macers attended at thesse proclamations. There is 4 lb. Scots distributed amongs them for each Act proclaimed, which makes the controversie. They are the Lyon's brether as weell as the Heralds, and may execute summonds of treason as weell as they, which an ordinar messenger-at-arms can not doe, becaufe it most be with sound of trumpet, and their coats on. The Heralds wear coats richly embroidered ; the Pursevants have only painted ones. The Macers (who are only servants) and the Messengers, *Feciales, Caduceatores, Armorum Reges, Viatores, Apparitores, Officiales, Beroarii, Nuncii, &c.*, have none, only they have a blazon. No. 186, p. 71.

6 *Junij* 1679.—From this time till the beginning of Jully, there was a surceas of bufinesse in the Session ; so that their was only reading of bills in the Inner-house during all that tyme, in respect of the commotion in the West ; and that many of the subjects ware, by command of the No. 188, p. 73.

Secret Councill's proclamations, attending the King's army. But that affair being ended, the Lords entred again to buſines, tho with much tendernes, that no advantage might be tane in reſpect of anie's abſence or unpreparedneſſe :—See the accompt of that infurrection in the other manuſcripts beſyde me.

No. 207, p.  
78, § 1.

28 *Julij* 1679, being Moonday, Meſſrs. John King and John Kid were pannelled [at Crimjnal Court] for preaching at field Conventicles, (which, by the 5 A& 1670, is death to the miniſter,) and for being in armes at the late rebellion in June laſt, in the Weſt. They offered ane exculpation to the Juſtices on thir heads :—1<sup>o</sup>, That they ware only preſent in the ſaid army caſually, and not intentionally, and ware in a manner detained priſoners by them ; and ſuch naked preſence without aſſiſtance was not criminall ; and that they ware ſo far from being incendiaries to incite the people, that they, on the contrare, intreated them to lay doune their armes. 2<sup>do</sup>, The Duke of Monmouth had power, by his commiſſion as Generall, to pardon, *remiſſiones dare* ; and they offered to prove by witneſſes that he had proffered them a pardon if they would lay doune their armes, and that they accepted it. 3<sup>do</sup>, They ware willing to engadge to live peaceably, and never to keep field-meetings heirafter.—But their exculpation was repelled in reſpect of the libell ; and they, upon their ſubſcryved confeſſions that they ware preſent in that army, ware found guilty of rebellion by the aſſiſe, and ſentenced by the Criminall Lords to be hanged on the 14 of Auguſt theirafter, and being dead, their heads and right hands to be cut of, and put upon the Netherboll-port, beſyde Mr. James Guthrie's. They gave them large ſpace to allow them application for a pardon ; which they did, but the King refuſed it. They got not their citation upon 15 dayes, but only 48 howers, being in priſon already,

§ 2. and in *crimine perduellionis*. (See the information for James Balfour and the other 8 that ware pannelled at this ſame tyme, for being in that rebellion, which contains very many pretty points in law : for the 15 dayes, ſee the Advocat's Criminalls, page 472.) Being in laſe majeſtie, they got their copie, and ware ſummoned by a herauld with his coat on, and with the ſound of trumpet. In treaſon, the King's Advocat, as per-

shuar, is laft speaker if he please. The pannell's advocats represented to the Juftices, that being *in crimine perduellionis*, the Privy Councell had granted them a warrant to appear for the pannells; but many thought they needed not this, fince the 38 A& in 1587 authorized them; yet fee 135 in 1584, and it is fafeft to seek a warrant.

George Ogilby, Albany herauld, being one of their affisers, pretended § 3. that the Lyon, by his gift, had exeimed them from affises, (*quæritur* if the Lyon can doe it,) and protested it might not prejudge his priviledge. Thomas Broun, as late threfurer of Edinburgh, and fo a magistrat, begged to be excused and not put upon their affyse; but both their excuses ware repelled by the Juftices.

On the 14 of August 1679 the fentence was execute againft the faids § 4. Mr. John Kid and King, (the indemnity having been proclaimed with much pomp in the forenoon; concerning which, and their death, fee many obferves in my *Historicall Manuscript alibi*.) They had mourners with them on the scaffold, which is not allowed for traytors, unles a speciall licence be granted by the Privie Councell; but heir it was not taken notice of. Vide l. 35, *D. de. religiofis et sumptibus funerum*. Many thought Kid more composed then Mr. King, and some adventured to fay, that Mr. King, for infusing couradge in him, had drunk more then was fitt for him to doe, which is a most dangerous pra&tice. See Mr. Trap's commentary on the 31 of the Proverbs, v. 6,—“Give strong drink to him that is ready to perish;” who tells us, that Vitellius made himfelfe drunk to droune the fear of death. See the copy of both their speeches at full lenth besyde me.

*Eodem die*.—Mr. William Weitch, who had been forfault in abfence No. 207, § 5. for being in the Rebellion 1666, and many minifters who ware in prifon, ware all liberat by vertue of the King's pardon, indulgence, and indemnity: And, if Mr. William had been reponed to his defences, or needed them, it was alledged the decreet of forfaultor prononced againft him upon a probation tane in abfence, of his being at the Pentland Rebellion in 1666, had a materiall nullity, viz. that the executor of the dittay of treason, and the witneffes, ware not fworne in the Court upon the truth

of the executions; for the lack of which formality, Hope, in his large *Praëtiques*, *titulo* Forfaultors and Treason, shows, that sundry decreets of forfaultor have been reduced; for in the executing of a breiff, such as the service of ane air, or the like, that solemnity of swearing the executions is requisit and praëtised. *Ergo, multo magis* in this case, *ubi nulla de morte hominis cunctatio longa*. 2<sup>do</sup>, The dittay was not execute at his duelling house, which he had before the said rebellion and rising in armes.

No. 211, p. 80. 29 *Julij* 1679.—At the Justice Court the Laird of Maccloud pershues Macneil of Baro and his brother for deforcement of a messenger; who, being convict by the Affise, the Criminall Lords fyned the pannell in 1000 lb. Scots, 500 mks. to the King, and 1000 mks. to the partie, and imprisoned him till he payed it.

No. 216, p. 81. 31 *Julij* 1679.—Their ware sundry other causes this session wheirin I was concerned, and upon which their was some debate or interlocutors, which I heir omit for brevity, as Pitmedden's and Mr. Alexander Auchinmutie's charge against John Hamilton, merchand. 2. Edward Gilespie's against James Grahame. 3<sup>do</sup>, The Lady Rosslyth against the Laird. 4<sup>to</sup>, Carfan and Glendinning. 5<sup>to</sup>, Colin Robertson and Gray of Skibo. 6<sup>to</sup>, Earle of Winton and David Scot, apothecar. 7<sup>o</sup>, Thomas Hamilton against his brother John Hamilton, merchand. 8<sup>vo</sup>, James Baynes *contra* Lermont of Balcomie. 9<sup>o</sup>, Hew Blair against Jean Robertson his taver-nor. 10. William Anderfone against George Monteith. 11. George Heriot against Mr. Harie Blyth; and sundry others, wheirof see the informations besyde me.

No. 217, p. 81, § 5. I hear, in a pershuit at Littlejohn the taylor's instance against the Dutcheffe of Monmouth, in 1667, for taylor compts, the Lords found, in respect shee was *persona illustris*, that theirfor shee behooved to be liable, tho it was offered to be made appear that shee was intertaind *aliunde*, and had allowance for cloathing and all other necessars. This may be confidered for the case of David Scot's furnishing the late Countes of Winton, in his pershuit for it against the Earle of Winton.



13 *et* 14 *Augusti* 1679.—By order of Privy Councell, his Majestie's No. 218, p. 82. Indulgence, Pardon, and Indemnity was proclaimed, and a proclamation issued out for a Circuit Court, for going thorow some shires, and to begin on the 1 of October, and mainly for discovering the Archbishop of St. Andrews' murderers; as also for trying other crymes. See thir A&s in print, and see large characters of thir affairs in my other historicall manuscripts.

26 *Augusti* 1679.—This day did Christian Hamilton, a daughter of No. 219, p. 82. Grange's and wife to Androw Nimmo, merchand, kill James Lord Forrester, with his owne sword, in his garden at Corstorphin. Shee confessed the fact, and pretended shee was provoked theirt, because he, in his drink, had abused hir, and called hir whoor. Being apprehended and imprisoned, the shirefs of Edenborough (conforme to their privilege of judging within 3 suns, but it seems they are not tyed to execute their sentence within that space,) gave hir an indytment to the 28 of August, where shee made a large discourse of the circumstances and manner of it, seeking to palliat and extenuate it; yet subscribed hir confession of the fact; and, for putting it beyond all cavillation, they also adduced 3 witnesses, two men and hir woman, who saw it.—But shee having pretended that shee was with child, the shiref and his deputes had directed a commission, recommending to Doctors Stevinson and Balfour, and to David Pringle and Hew Broun, chirurgians, to visit hir and report; who having done so, they, by an attestation under their hands, declared, that after tryall they could perceave no signes nor evidences of hir being with child; but, in regard shee was so assertive and positive, and that shee said shee was not three moneths gone, they could not certainly affirme shee might be with child, it being almost impossible to determine it in the first quarter. *Vide titulum D. de ventre Inspiciendo.* Their is no woman that is past 12 and within 52 that is accused and condemned to dy for a malefice, but shee may pretend hir being with child, since the thing is possible that shee may be so. However, if the pannell had been with child, shee did not deny but it was to my Lord Forrester, which was both adulterie (shee being married and not divorced) and incest, shee being my Lord's first

ladie's neice and sifter-daughter; so that the visible judgment of God may be red both upon hir and him; but see for this my historicall manuscript. In respect of the ambiguity of the phyficians' declaration, the shireff-deputes qualified their sentence thus,—the Affise having returned hir guilty of homicide, (it was likewayes hamefucken, as also adulterie and incest, but none of thesse were libelled,) ordained hir to be headed on the 12 of November nixt, that in the mean tyme it might be certain whither shee ware with child or not, and if shee ware, then shee might apply to the Privy Councell by a bill and obtaine a prorogation of the tyme till shee ware brought to bed; for, tho the child be incestuous, yet it is innocent, and not to be put to death. I find by the law of England shee would have gotten no delay, for Judge Stanford, in his Pleas of the Croun, *in ipso fine* of that work, tells the malefactor most be with quick child, else hir execution does not fitt: Our law is more humane, and thinks that ware *spem animantis perimere*, even wheir the foetus *non est adhuc animatus*. But in law their may be danger, and a great prolongation of the execution of justice; for a woman may cause get hir selfe with child of purpose, even in the prison, and, having borne that, may cause men impregnat hir again, tho after sentence; but in this case they should be carefully sequestrat from men, and within a few dayes after the birth they may be execute. The Romans ware just contrare in their custome, for a virgin (especially a Vestall) might not be put to death with them till first the hangman had defloured them, and then they ware strangled.

On the 19 of September 1679, Christian Hamilton gave in a bill to the Lords of Privy Councell, representing that the shireffs gave hir no tyme to provyde hir selfe with advocats, so that shee had omitted hir defences, and begged the Councell would examine hir witneses, and take tryall of the manner of the commiffion of the slaughter, viz. that he was then drunk, in which condition he commonly was very furious, that shee was exceedingly provoked, that he run at hir with his sword, that shee took it from him to preserve hir selfe from hazard, and that he run upon the sword's point and theirby gave himselfe the mortall wounds wheirof he dyed, and so killed himselfe, and shee stood only upon hir lawfull defence. This relation was knowen to be false, and was contrare to the probation adduced

already before the shireffs, and therefore the Lords of Privy Councill did little regard it now, tho it was relevant in it selfe, but sent for Mr. Jo. Wauns, keiper of the Tolbuith, and ordered, under a severe certification, to keep hir stri&ly that shee escaped not, which was surmized shee intended. Shee was pershued by Mr. Ruthven and the other children of the party slain, and their curators.—Shee was a woman of a godlesse life, and ordinarily carried a sword beneath hir petticoats.—Hir affirming hir selfe to be with child was but a shift to procure a delay.—Mistris Bedford, who murdered hir husband, and committed adultery with Geills Tyre, was this Mistris Nimmo's cusing-german, and of the family of Grange Hamilton; and they say the Ladie Wariston, who, about 100 years agoe, strangled hir husband, Kincaid of Wariston, shee was of the same family.—Baker, in his Chronicle of England, in the Life of Henry the 6, *ad annum* 1429, tells, the Maid of Orleans, to delay hir burning, feigned hir selfe to be with child.

On the 29 of September 1679, the said Christian Hamilton made hir escape in man's apparell out of the Tolbuith, in the glooming, about 5 a cloack at night; but was the nixt day found at Falaw Milne, wheir shee had stayerd, and did not hasten to the English Borders; and was brought back to the Tolbuith on the 1 of October, and was beheaded at the Croce of Edinburgh on the 12 of November 1679, all in mourning, with a large wail [veil], and before the laying doune of hir head, shee laid it off, and put on a white taffitty hood, and bared hir shoulders with hir oune hands, with seeming courage enough.

18 & 19 *Septembris* 1679.—At Privy Councill the Lady Letham and Mr. Edward Ruthven's curators give in a complaint upon Lilius Forrester, Lady Torwoodhead, W<sup>m</sup> Bailzie hir sone, William Gourlay, and others, for intruding themselves into the house of Corstorphin, and impeding the buriall, *contra leges* 2. et 3. *D. de in jus vocando*, and refusing to goe furth of it, and beating the Lady Letham, and cutting the pleuch graith, albeit Mr. Ruthven's curators ware in the civill possession, and continueing the naturall possession that was in his father's persone, and whei of they could not be summarly dispossessed.—Alledged for the defenders, that

by the tailzie of the lands of Corstorphin, made in 1649, by umquhile George Lord Forrester, failzeing of airs of James Bailzie and Miftris Jean Forrester, his eldest daughter, William Bailzie of Torwoodhead, and the airs to be procreat betuixt him and Miftris Lilius Forrester, the said lord's 2<sup>d</sup> daughter, are substitute, and the next member in the tailzie, (of which see at large in another manuscript;) now their being no issue procreat betuixt the said James, late Lord Forrester, and his first ladie, the tailzie exists, and the substitution devolves to Torwoodhead, and in 1650 he is *per expreßum* infest as substitute air of tailzie, (yet this would not give him right without a service and retour, since James Bailzie is fiar by the conception of the tailzie, and Torwoodhead and his airs only airs of tailzie to him,) and so might lawfully possesse himselfe of the house, even as a fiar may summarly enter, when a liferenter of his house dyes; but heir the last Lord Forrester was not a naked liferenter, but might contract debt upon the said estate of Corstorphin, and dispose upon it to whom he pleased; and it's affirmed, he hath made a disposition of it to Edward Ruthven, his sone of the second bed, and in such a case the air of tailzie ought not to enter summarly, but the air of line of the last fiar may continue their father or prædecessor's possession, till they be put from it by the air of tailzie by law. 2<sup>do</sup>, Alledged, their staying in the house was only to see the chartor kist, wheirin they had interest by the tailzie, might not be imbecilled but secured.—The Lords fand matter of ryot in the complaint, and admitted it to probation, and though it was slender, yet they commanded the Ladie Torwoodhead and hir sone to go and ly in prison during their pleasure, and reponed Mr. Ruthven's curators, (he being out of the kingdome,) to the possession of the house; ordained Mr. Gourlay to pay 100 lb. Scots of fyne, and to goe to prison, their to remain till he pay it. The Lord Elphinston, and Mr. Richard Maitland of Dudhope, 2 of the curators and councellers, interceeded with the Councell to remit that part of the sentence against the Ladie Torwoodhead and hir son, which the Councell did at their desire. The Lords of Councell also ordained the chartor kist to be secured and inventared, and referred the point of right as meerly civil to the Judge Ordinar the Session. (Vide Foster's *escheat supra*, page 68.)

19 *et* 20 *Septembris* 1679.—Thir dayes their was a great debate at No. 221, Privy Councill: His Majesty, by his indemnity, had pardoned the <sup>p. 84.</sup> lives of all them that had been at the Rebellion in June last, (except ministers, heritors, &c.,) providing thesse of them that ware within the country should compear before such as the Councill should appoint, betuixt and the 18 of September, and give bond in this forme, that they should never heirafter rise up in armes against the King's authority. Very few of them having compeared and offered themselves willing to signe this bond, General Dalzeill, the King's Advocat, and some others, contended they had forfault the benefit of the King's pardon, and so might be lawfully proceeded against as rebels. The President, Craigie, Abotshall, and others, plead,—It ware hard to conclude 3 or 4000 poor peeples under so cruell a certification, upon the circumduction of a terme wheirof they might be ignorant, or might be sick, or have some other reasonable excuse. That the King had been mercifull to them, and it was not fitt for the Councill to defait and disappoint his goodnesse; and theirfor it ware just to prorogate the tyme, and give them yet a farder dyet, betuixt and which they might all be advertished to come in, and know their hazard; and not take advantadge of so great a multitude. Then it was urged, that none might be reponed but such as ware able to instruct a legall impediment, why they came not in betuixt and the said 18 day. But this was objected against, as so difficult, that it would render the favor utterly ineffectuall. At last it was agreed on that they should wryte a letter to his Majesty, representing the case to the King, that he might authorize and impower his Justices in the Circuit Courts, in October next, to take their bonds in the respective shires as they goe throw, tho the first day assigned them be expired, which some judged too short, in ane affair of life and death of so many.

On the 6<sup>th</sup> of November 1679, at Privy Councill, there is a letter from (ib. marg.) the King red, allowing the Justices of Peace in the severall shires, to take bonds of thesse who ware in the late Rebellion, notwithstanding the day formerly assigned them for doing it was elapsed, providing they show a rationall excuse of sicknesse, ignorance, absence, or the like, why they took it not within the 18 of September, formerly limited.

2<sup>d</sup>. Thir dayes, severall of the non-conformist minifters who ware not in the rebellion, applyed to the Privy Councell to be licenced to preach at particular meeting-houfes, conforme to the tenor of his Majefties indulgence; and accordingly their was 7 admitted,—Mr. George Johnfton to Newbotle, Mr. Luke Ogle to Langton, Mr. John [William] Row to Sires in Fyffe, &c. It was enjoyned them not to affume or attempt to preach in the churches, but in meeting-houfes. The Bifhop of Edinburgh would have had them inftru&ing wheir and when they ware ordained to the miniftrie, with fundrie other qualifications; but the Councell found them fuch clogs, as, if they ware ftrictly required, few or none of them would have been able to have paft mufter. All the forme of the bond required of them, and put to fuch heritors of parifhes as gave them a call, was, that they fhould live peaceably, and appear when the Councell called for them.

3<sup>d</sup>, *Eodem die*.—William Cockburne, merchand, gave in a bill to the S. Councell, representing that he was banifhed the 3 Lothians in December 1674, (fee the other manufcript, folio 236,) for fome expreffions in a letter reflecting on the Vicounteffe of Oxenfuird, and that his Majefty, by his late indemnity, had pardoned all pafquills, infamous libells, and fentences of the like nature, and remitted them both *quoad vindictam publicam et privatam*, and commanded his indemnity to be extended by his judges, with all favor and latitude, &c.; and theirfor craved their Lordfhips would declare he was free theirby, and difcharge Oxenfuird to trouble him, &c. The lawyers in the Councell contended the a&t of pardon did not reach his cafe, being *res judicata inter personas privatas*, for a private injurie done by him to that ladie, without any relation to the publi&t concernes, and that the fynes impofed by the Councell ware excepted from the indemnity; and tho this was not *multa pecuniaria*, yet it was a fyne in *fuo genere*, a confinement; and theirfor they refused his bill. Some thought this cafe might, without much wrong, have been included in the indemnity. The King's pardon in England does not comprehend private offences: (fo Styles in his pra&tically regifter, voce pardon, page 433.)

## THE CIRCUIT COURT.

8 et 9 Octobris 1679.—On thir 2 dayes was a Justice-Air, *Iter Justiciarie*, or a Circuit Court, held at Edenborough, by order of the King and his Councill's proclamation, at which place, past memorie of man, their was no Circuit held ; nather indeed needs their, it being the center, and the ordinarie seat and residence of justice ; and the designes of thesse Circuits, (which vide *alibi* of the circuit held nyne years ago in Aprill 1670, and of David's Circuit Courts thorow Israel, in another manuscript, p. 85.) in France they are called *les Grandes Jours* ; and in England, their country Circuit Affizes, or Justices in Eyre, are to warme and influence thesse parts of the nation that are remote from the places of judicator, and whair malefactors stand lesse in aw theirow. Many think this Circuit hath been very expensive to Scotland, and to have been more than a year's cesse out of their purse ; and yet they dispatched litle or no bufinesse, but continued or deserted dyets, whair people had been calumnioufly dilated, and none appeared to informe his Majestie's Advocat. After a sermon made by Mr. John Robertson, with sound of trumpets and guards, they took their place in the utter bench of the Parliament House. First, the Court was fenced in the King's name, and all forbidden to disturb the same ; then the Justice-General, Justice Clerk, and remanent Commissioners of the Justiciarie, their last patent and commission from his Majesty, dated in November 1678, in Latin, was red, which bears a *salvo* of the Lords of Regality their priviledges ; yet I hear that regalities, tho they repledge from Justice Courts, yet not from Circuits. Then the suit rolls of all the suitors *señtatores* within the 3 Lothians, that is, the freeholders of the King, tho they be but petty fewars, ware all called, as being commanded to give suit and prefence at Circuit Courts, as weell as head courts ; then the 45 upon the assise ware called ; then the witnesses summoned for proving each particular cryme tane up in the portuous roll (see concerning this word, Skeen *de verborum significatione, voce Porteous*) ware called. The suitors or King's wassalls, the assysers and witnesses absent, ware unlawed and americiat in 100 lb. Scots ; at ordinar Justice-

No. 222,  
p. 85.

Courts it's but 100 mks.; some were excused, as Sir A. Ramsay of Waughton, &c., upon testificats from ministers or physicians, of their sickness or other indisposition; but the Justices required them to be, on soul and conscience, which declaration physicians scruple to give, as being sworn to the calling *in initio*.

1. They had 4 meetings in the 2 dayes. At the 2<sup>d</sup> meeting were called all these that were pannelled for not putting out their full proportions of the militia, to be fyned conforme to the fynes imposed by the 2<sup>d</sup> A& of Parliament in 1669, and the 1 A& in 1672, and the Councill's proclamation in June last, 1679; but finding it so slender and inconsiderable a point of dittay, if anie at all, they referred them all to be perhued before the shireff, commissiioners of the militia, and other judges ordinar as accords. Then were called the heritors, ather holding of the King or others, who were pannelled for staying at home, and not going alongft with the King's hoist to Bothuelbridge against the rebels in June last, according to the Councill's proclamation. Some were within 16, others past 60; some were then sick, others sent out their best horse with a man, &c. However, the Justices continued the dyet against them all till November next.

2. Then one James Bartilman was called for murdering of one Smith, ane old man, in Salton wood, on the 8 of September last, by braining him with a stone; he had confest it before the shireff-deput of Haddington, but he was not a judge competent after 3 suns, tho he was tane in *flagranti crimine*, at leist a litle after; the horror of the fact having then mollified his heart; but before the Lords Justiciars he began to retract, and to say, that the old man was coming to ride on the horse behind him; and the horse being scare, he tuice threw him of, and so he brock his neck, and he threw a stone in anger at the horse, but it lighted on the man's head, and his neck was broken before. Tho many thought he prævaricated, yet amongs the Jews he would have got the benefit of the city of refuge, as a casuall murderer, and in England, of the clergy and neck-verse. Mr. John Eleis, out of pitty and commiseration, (for *quilibet*, tho unemployed, is *idoneus defensor* of ane pannell,) undertook his defence, and alledged, (having called for the executions) that he had not gotten 15 free dayes.



2<sup>do</sup>. Had not gotten the full list of the name of his affysers and witnesses. Answers the King's Advocat, he neided not, 1<sup>o</sup>, Because he brings him out of prison, being tane reid hand, and in that case he may judge him in 24 howers; and Messrs. John Kid and King and 100's of others, got no more, and this ware to question the justice of the nation, as having illegally execut them. 2<sup>do</sup>, In the case of a portuous roll at a justice-air they neid not. Replyed 1<sup>o</sup>, In thesse cases it was not objected. 2<sup>do</sup>, King and Kid ware pershued for treason, which cryme is priviledged even as to citation, probation, &c. 3<sup>do</sup>, The sixteint A& of Parliament in 1672, regulating the Justice Court, without any distinction ordains all pannells to have a competent space, (tho it mentions not 15 dayes,) and to have the affisers and witnesses names, *Ergo nec nos distinguere debemus*. And the same A& appoints the Circuit Courts with one breath, and how shall they have objections ready, if they know not the witnesses or affisers names till they come to the bar? so that it is one of the most just laws that can be made for security of our lives and fortunes, and is indispenfible. The Lords (tho this fellows blood was designed as the sacrifice for this circuit) yet demurred so on thir dilators, that they ordained him to be tane back and keipet in close prison, and continued his dyet till November, and in that tyme he may know both his affysers and witnesses names. Thus was he pulled out of their jaws for a tyme, and even the relevancy of his confession will be somewhat debateable.—On the 14 of November 1679, the said James Bartilman was found guilty by the affise, and was hanged on the 19 of November thereafter.

3. Then ware called such as ware pannelled for adulterie, who ware very numerous; but most of them ware absent, and denounced fugitives. The forme was—"The Lord Justice-General, the Lord Justice-Clerk, and the remanent Lords Commissioners of his Majestie's Justice Air, adjuges and decernes, A. B. and C., as fugitives from his Majestie's law, and ordaines all their moveable goods and geir to be escheit and inbrought to his Majesty's use, for their contempt." The Provost of Edinburgh (who waited upon them, and sat in a chair besyde them,) protested in behalfe of the regality of Brughton and the Canongate, belonging to the good Toune, that the escheits of such as dwelt within their said regality and ware de-

nonced, should belong to them; which protestation was admitted; (see Hope anent this point.) Some had remissions for their adulterie, which doe now too frequently passe of course; some had signators componed, but not past the sealls; they were ordained to find caution to exped it betuixt and a day: some were continued. I alledged for George Young in Winchebrugh, that that part of the dittay (for in the portuous rolls at Justice Airts they have not full libells and indytments, but only a summarie abridgement of the cryme,) that he conversed familiarly with Margaret Bailzie, Torwoodhead's daughter, was nather relevant nor criminal in law *per se*, unlesse it ware taken complexly with that other member, that in the copulation betuixt them their was a child borne in 1677; and even their they ought to condescend on tyme and place, and the moneth at leift, since he might prove *alibi*.—The Advocat declared, he was not ready to infist. I urged he might be put to the knowledge of ane assyse, since he was most calumniouly dilated, and was conscious of his innocency, and dissatisfied to a continuation or to a deserting of the dyet, since their malice might trouble him afterwards, by raising a new libell. The Lords, without a pershuer infisting, found they could not put him to ane assyse; but deserted the dyet simpliciter, and discharged any new letters to be raised against him, except the warrand of them ware subscryved by a quorum of the Lords, which is 4, and that the pershuer fand sufficient caution to infist. One Cuthbertstone in Lithgow at the taking up of the rolls, named himselfe as one of whom the neihbours suspected of adultery, but he denied it.

4. Then thosse pannelled for witchcraft ware called. One of which, named Jonet Hill, in Leith, having got hir citation to appear, did, on the 26 of September 1679, hang hir selfe, and was dragged at a horse taill to the gallow-ley, and buried under the gallows. A man called John Scot, in Leith, and a woman called Chousley, in Preston pans, compeired, and the dyet was deserted in regard their was none to infist.

5. Then David Ofwald, sone to Mr. Androw, and some others, ware pannelled for resetting tennents who had been at the rebellion, and who had not taken the bond. He was ordained to goe to prison till he found caution to appear at the nixt dyet.—Catharen Sinclair, sifter to Mr. John [Sinclair], minister at Ormiston, and some others, being conveyned for hounding

out and sending people to that rebellion, and resetting them since, and threatening and abusing them who went with the King's army, and refusing to sell them powder and lead, &c. They denying it, the King's Advocat offered to refer it to their oaths. Answered Mr. Pat. Home, It was criminal, inferring life and limb, and *nemo tenetur jurare*, &c. Replied, Sir John Nisbet in 1674, when he was Advocat, procured a letter from his Majesty bearing, where crimes by the statutes and Acts of Parliament have a definit and determinat paine, it should be lawfull for his Advocat to restrict the paine to ane arbitrary and pecuniary mulct. Duplyed, 1<sup>o</sup>, No such letter produced, and *de non apparentibus et non existentibus idem est judicandum*; 2<sup>do</sup>, It seems contrarie to law to alter Acts of Parliament, yet the King may give a remission, or discharge their fyne for a 6 pence. The Lords continued them under caution; for some of them it was alledged such a man could not be a witness because he was informer. Replied, 1<sup>o</sup>, *Non relevat*; 2<sup>do</sup>, The Advocat insists alone.

6. Next one John Rutherford, bailzie of Preston, and sundrie others, were called for buying the gentlemen's corn about with a false firlo, being larger than it ought to be. Alledged, that *esto*, they had used a false measure, which they deny, yet they were *in bona fide*, seeing they offer to prove by the same witnesses the Advocat shall adduce, that they bought and sold with a publick firlo belonging to the town of Preston, marked with the Laird's mark, and owned by his Baron Bailzie, to whom the care of metts and measures is concredited by the Acts of Parliament, and if it were a false measure the Baron and his Bailzie must be first punished for it. The Lords continued the dyet, and ordained the measure to be produced. What if one using a false measure should afterwards break it in pieces, the crime might be proven by witnesses against him without production of the measure?

7. Thereafter the dyet was continued against the Papists, hearers and sayers of messe, the Quakers, and others who were pannelled for their perverse judgements and opinions.

8. Thereafter, were called such as have been at Feild Conventicles since the King's indemnity in August last. *Item*, These who were in the rebellion in June last at Bothuell Bridge; some of them who were

in priſon ware conveyed for treaſon: and to cut them of from the benefit of the King's pardon, (for *qui utitur principis gratia vel clementia fatetur crimen*; yet *quaeritur*, If that will hold in public indemnities, as weell as a private remiſſion?)—they libelled againſt them riſing of houſes, and ſtealing of horſes and armes. See the Informations contending, theſe being done *in curſu rebellionis*, are alſo conſequentially pardoned. Theſe in priſon ware continued to another dyet; of the reſt, ſome compeared, and told they had taken the Bond before the day limited, viz. the 18<sup>th</sup> of September, and ware diſmiſſed. One of them queſtioning and doubting whether it was a rebellion or not, was threatned to be ſent to priſon;—the awe made him change his note, and confeſſe it was a rebellion. Some hundreds ware denounced fugitives. After which the Juſtice-Generall advertiſhed all of harboring or reſetting them, ſince they ware now traitors, and in law might be killed *privata auctoritate*; for *bannitus ob perduellionem poteſt impune occidi*,—the reſetters would be eſteemed as guilty as themſelves heirafter; and took all who heard him to witneſſe, how tenderly they had offered to them his Majeſties royall pardon, if they would have come and given ſatiſfaction by taking the Bond, but they had moſt contumaciouſly reſuſed that gracious offer; And then thanked my Lord Halton, ſhireff, and the reſt of the gentlemen for their attendance. Halton answered, They had done no more then what they owed to the King, and their Lordſhips, his ſubſtitutes.

9. There ware many other points of dittay upon which ſeveralls ware pannelled, as regratting and forſtalling the mercats, and buying up viſtuall to a dearth, hameſucken, oppreſſion, wrongous imprifonment, deforcements, ſhooting of doves, &c., and many others; the catalogue wheiſof ſee beſide me, as alſo in Skein's tractat of crimes, at the end of *Regiam Majeſtatem*. It fell to be queſtioned, Whither uſurie, muir-burn, ſteiping of lint in lochs, and ſuch like pænall ſtatutes, be pardoned and remitted by the King's laſt indemnity. His a& of grace in March 1674, did pardon them; but the King's Advocat affirmed they ware not remitted by this indemnity in Auguſt laſt, which related only principally to 2 things; 1<sup>o</sup>, To conventicles and intercommonings; 2<sup>do</sup>, To public& adminiſtrations and offices, and Walter Riddell in the Bill-Chamber cloaths himſelfe with it. It was

intimat to the heritors, to wait upon the Justiciars in ther going to Jedburgh to hold a circuit their, till the limits of Berwickshire.

Thus ended this Circuit, being but a ludibrie and shadow of justice: *Parturiunt Montes, nascitur ridiculus Mus.* The murderers of the late Archbishop were also called and denounced in absence, and they and the rest will be declared fugitives over the Croce of Edinburgh. It was questioned, Whither heritors, not as yet infest, ware obliged to goe to the King's hoist, or to attend at the Circuit Court, and who ware naked fiars, their being a lifrenter of the wholle, or who had only *jus reverfionis*, it being wodset or apprysed? or if proper wodsetters ware bound to suit and preface, or to goe to the King's hoist? In the old Criminall Begisters, I find sundry producing exemptions under the King's hand, from raids, hoists, affises, &c., and the judges admitting them. At Jedburgh, it is thought they cannot meddle with thifts and slaughters, because thesse belong to the Commiffioners of the 2 Borders, under the great seall of both kingdomes, privative of all others. (See the forme of the justice air, drawn furth by Skein, in a tractat at the end of *Regiam Majestatem*.) In a Justice Court, no peremptor defence can be proponed in behalf of a pannell that is absent, for if he be not excused he most be denounced. See excuses for such as hyde from the King's hoist in the Adjournall criminall books in 1587, and *passim alibi*; some are dead since the said tyme they ware summoned to attend, some had the King's licence, some ware at the raid, some ware then lying sick, some had a remission for their absence, some ware exeemed as burgesfes of Edenburgh, some had no land, at leift not ane oxengate of land, others fand caution.

#### WINTER SESSION 1679—NOVEMBER.

6 *Novembris* 1679.—At Privy Councell their is a letter read from his No. 226, p. Majesty, nominating Lieutenant-Generall Dalzeel Commander-in-cheiff of <sup>91.</sup> all the forces in Scotland, with power to him to act as he shall think fitt, and only to be liable and accountable to, and judgeable by, his Majesty himselfe; for Dalzeell would not accept it otherwayes; only he promised

and declared, that in difficult exigents he should take the advice of his Majestie's Privy Councill.

2. *Item*, the King's letter is also red, prorogating the day of the taking the Bond by such as ware in the late Rebellion last Summer, to the 1<sup>st</sup> of Januar nixt. *Vide supra, in margine*, at the 19 and 20 of September last.

3. Mr. Maitland is sent, in name of the Privy Councill, to compliment the Duke of York, who was now upon his way towards Scotland.

4. This same day, Sir Patrick Nisbet of Dean was proceßed for being at a field conventicle. Alledged, It was only a house meeting since the King's proclamation of Indulgence, and so fell under the compasse of the law. Replied, 1<sup>o</sup>, It was a feild conventicle, for there ware severalls without doors; but I think this cannot be a good mark of a feild conventicle, else, whow easie a thing ware it for the souldiers or bishops to hyre 8 or 10 men to stand without doors at their licensed meetings. But 2<sup>do</sup>, it was replied, *Esto* it ware no more but only a house conventicle, the King's indulgence hath not permitted them, but only wher upon application to his Privy Councill, they are established, and this was no such meeting. Duplied, The people understood the pænall statutes to have been dispenced with and relaxed in so far as concerns house meetings two miles from Edinburgh, and his Majestie's proclamation of indulgence feimes only to militate against and to prohibit feild conventicles. Yet the Councill inclined to find that, notwithstanding of the said indulgence, they might yet punish and fyne house conventicles unlicensed by them. Some cryed out, that this disappointed his Majestie's favor of the indulgence; but it is the non-conformist's oune fault that doe not addresse to the Privy Councill for a licence. However they found the libell relevant against Sir Patrick, and repelled his defences, and admitted the complaint to probation. But, though the thing was true, yet the probation was scrimp; and so he narrowly escaped, having bought the friendship of some great ones.

them, at great lenth, besyde me, which deserve to be red, only I shall adde heir a litle farder. 1<sup>o</sup>, It was alledged for them that, by the 125 A& of the Parliament in 1592, they ought to get their citations for treason by a herauld, macer, or perfevant, with sounnd of trumpet and ther coats on. This had been repelled in the case of the prissoners taken in 1666, for ryfing in armes at Pentland hills, and fell not to be debated heir, because in the citations given them, this solemnity was used; at leift the executions boor it. 2<sup>do</sup>, Alledged, all citations, by the 85 A& of the Parliament held in 1587, should be given in day light, before the sun set, and not after sun set, as this was. 3<sup>th</sup>, It should have been on 15 dayes, wheiras heir they have not got 24 howers, in regard they got ther indytments on Saturday late at night, to compeir on the Moonday thereafter, so that Sunday is not to be compted as a free day, wheiron they could seek ane exculpation; and by the 6<sup>t</sup> chapter of the 1 book of *Regiam Majestatem*, all citations should be on 15 dayes. Answered by the King's Advocat, thesse a&ts duely considered doe not relate to criminall affairs. Then 4<sup>th</sup>, it was alledged they ought to have gotten the full copies of their confessions they had emitted, and which the Advocat declares he will make use of against them, *in modum probationis*. Replyed, he is by no law oblidge to give them the double of the probation, but only of the libell. The Lords of the Justiciary repelled all thir defences, and sustained proces: But if this came heirafter to be urged, as a preparative and a pra&tique, it may be answered, that their are 3 specialties heir: 1<sup>o</sup>, Thir pannells had got indytments 2 moneths before this for the same crymes; and it was *ex gratia* that new ones ware given them, they not being substantially different from the former. 2<sup>do</sup>, It was in perduellion and treason, and so is priviledged; some alledges this crime hes no priviledge as to the *induciæ deliberatoriæ*. 3<sup>o</sup>, They ware in custody and prisson, and so may be the more summarly brought to the bar. The Justiciars tryed the prissoners with great lenity; for they took them in severally one by one, and obtested and intreated them to take the Bond, never to rise in armes heirafter against the King, nor his authority. The most part of them finding ther hazard took it;—only 6 of the 30 refused, viz. one Broun, a sutor in Edinburgh, one Sword, one Weddell, one Wood, one Hardy, and one [Clyde?] who being all

put to the knowledge of ane inquest, five of them ware, by the verdict of the assise, returned guilty; and the sixth, viz. Hardy, was clenged and affoizied, because his confession did not bear that he was actually among the rebels, but that he was only taken in Fyffe. However, he had refused to take the bond never to rise in armes, or to call that rising a Rebellion. One of the five his confession only boor, that he was taken prisoner on the field, but likeways declared he had no armes; yet he was found guilty: naked presence in treason being criminous, except you exculpat and purge it by proving it was casual, by falling accidentally in amongs them, or involuntary, by being taken prisoner by them, and so detained, or the like excuse. The Justices by their sentence ordained the five condemned to be hanged, upon the 18 of November nixt, in chains in Magus-moor, to expiat and appease the Archbischop's ghost, who was their murdered. For though they ware none of the immediat actors of it, yet they ware accessorie, for they would not call it a murder. And though this was only ane error of ane ill-informed judgement, yet being conjoyned with the Rebellion, it served to justify the æquity of the sentence. Their being ane informality in the warrand for executing them, it was delayed till that day eight dayes, and then performed. Of old, by the law of King William, and *Regiam Majestatem*, if a theiff broke the rope, he was free; but this providence did not save them.—Within a few weeks their bodies ware stollen away and buried, and the gibbet throwen doune: which act of humanity we find was done to Saull's body by the men of Jabesh-gilead, in the last chapter of the 1. book of Samuel. No inquiry was made after this, though it was called by the Bischops an insolence, and affront put on authority.

No. 240, p.  
95.

15 *Novembris* 1679.—Three hundred of the prisoners taken at Bothuel Bridge, (and retained of the twelve hundred that ware taken,) and who ware appointed by his Majestie's letter to be sent and banish't to the Plantations, (the rest being all dismissed,) ware this day shipped aboard for Virginia or Jamaica:—and by storme of weather ware shipwrack't and broken upon the coasts of Orknay or Sheitland, and all drowned but some 30 or 40 men.



4 *Decembris* 1679.—*Post Meridiem*. The Duke of Albany and York <sup>No. 256, p. 99.</sup> took his seat in our Privy Councill, and voted without taking the oaths of alledgeance and supremacy, contrarie to the 11 A& of Parliament 1661, ordaining all Privy Councillors to take the forsaids oaths. But ther was a letter from the King dispensing with it, and declaring that A& of Parliament extended not to the King's family, or to the appearand or præsumptive air of the Croun. But it may be doubted if the forsaide A& of Parliament may be dispenced with by the King alone, and if it be solely introduced in his favors, and so may be relaxed by him; or if the security of the people, and of our religion, be not also concerned and wrap't up theirin. For though it be the King's Councill, yet it is for the good of the subje&, and the A& is generall, and *qui omne dicit, nihil excipit*. And in England they would not so tamely goe over ther Acts and admit him to sit in their Councill, without the oaths. And Shaftsburie gave præcedents wher the appearand air of the Croun did swear the alledgeance.—See *alibi* in November 1680, page 6, anent the House of Commons desire against the Duke, in my Historique Remarks.

9 *Decembris* 1679.—At Privy Councill, David Fergusson, as tutor to <sup>No. 261, p. 100.</sup> his grandchildren, craving that Sarah Keir, his daughter-in-law, and ther mother, may be decerned to deliver them up to be kept by him, as also to modifie ane aliment to them of ther mother's joynture. Answered, ther was a civill proces depending betuixt them before the Lords (*vide supra*, page 94) for recovering hir joynture. The Lords referred it to the civill judge, to be summarly discussed, and superceeded to determine ane aliment till the event of the said civill proces did make it appear what means and estate the children had unlifrented on their mother or goodfire.

11 *Decembris* 1679.—William Cockburne (of whom *vide supra*, p. 85) <sup>No. 265, p. 101.</sup> is this day fyned at Privy Councill in 5000 mks., for breaking his confinement, and imprisoned till he pay it, altho he had a very probable ground of error to think he was included in the King's indemnity.

18 *Decembris* 1679.—At Privy Councill ther was a motion, to take <sup>No. 272, p. 105.</sup>

5000 foot, and 500 horfe, out of the 22,000 men of the Militia, and modell them to be ftanding forces under pay constantly, whei of the country fhould bear one halfe, and the King the other ; and, that the expenfe may be the more eafie, that they fhould have no captains, but only lieutenants.

2. *Item*, The Magiftrats and inhabitants of Perth, who ware declared incapable about a year ago, are now reponed, and the fentence found pardoned and taken away by his Majeftie's general indemnity in July laft.

No. 277, p.  
106.

19 *Decembris* 1679.—At this time the propofall was made [at Secret Councell,] of felling wheat, bear, oats, meall, and all other grain by weight, as that which was the moft juft and æquall way of meafuring them, and freeft from all fallacy and deceit ; wheiras the felling them by pecks and firlots was expofed to falfe mets and meafures, to the tizing up of the meall, which is ane art in the mercat, and to other fuch cheats. A litle after this, ther was ane A& made upon it by the Privy Councell, and printed. *Vide* 10 *Feb*<sup>r</sup> 1680, et 5<sup>to</sup> *Martij* 1680.

No. 279, p.  
106.

24 *Decembris* 1679.—The A& of federunt againft folifting of the Lords is revived. *Item*, About this fame tyme 5 witches and a warlock are condemned and brunt at Borrowftounneffe, upon ther fpontaneous confeffions, emitted without any torture.

No. 282, p.  
107.

2 *Januarij* 1680.—Mr. [William] Abircrumbie, minifter at Maybole is imprifoned by the Lords, becaufe he offered to take the Earle of Caffills with caption for 2 years ftipend he was owing him after he had prefented a bill of fufpenfion, and ther was a verball ftop of execution. The bifchops fomewhat refenting this ufage, he being a conformift minifter, they got him liberat the nixt day.

No. 286, p.  
108.

6 *Januarij* 1680.—At Privy Councell, an order was made, that the gazetts and news letters red in coffie-houfes, &c. be firft prefented to the Bifchop of Edinburgh, or any other Privy Councellor, or to the Clerks of Councell, that they may confider of them, and therby falfe and feditious news and flanders may be prevented.

8 *Januarij* 1680.—The Duke of York in Counsell declared his diffatiff-<sup>No. 288, p. 109.</sup> faction at protections, which, both by A&ts of Parliament and Privy Councell, with us, and in all weell governed nations, are prohibite, as great stops to the free current of justice. Therfor, they now forbear ther odious name; and when they grant them, they are now termed licences.

13 *Januarij* 1680.—At Privy Councell, a complaint was given in by<sup>No. 293, p. 110.</sup> the shireff of Roxbrugh against the toune of Selkirk for making oppressive statutes within their brugh, that no citizen pershue before the shireff or regiftrat bonds but in the toune court-books; (*vide supra*, page 52, George Young and Mr. John Hay.) *Item*, Ther was a complaint against the toune of Lanrick, for suffering such as had not tane the declaration, to fitt in ther Toune Councell, yea some who ware in the late rebellion.

*Item*, Ther was a bill given in against Miftris Macgill, for exhibiting some retired bonds and other papers that shee had boasted shee had of my Lord Oxenford's, which ware of moment, and lying befyde hir husband when he dyed:—*vide supra* hir brother W<sup>m</sup> Cockburne's case and imprisonment, page 85 and 101.

21 *Januarij* 1680.—John Maitland, 2<sup>d</sup> sone to my Lord Halton, having<sup>No. 298, p. 111.</sup> married my Lord Kilmawer's daughter, and Stewart of Kirkhill's grandchild, obtains from the King the gift of my Lord Cardrosse (who had married Kirkhill's other daughter) his lifrent escheat upon a horning, wheirof Cardrosse had payed the debt, but neglected to relax or take a gift. The narrative of the gift proceeds upon 4 or 5 grounds of æquity, viz. the great services done by the donator's father, and his unckle, the Duke of Lauderdale, and ther predecessors, and other good offices done by them to the croun. *Item*, For the worthy memory of Chancelor Glencairne, hir grandfather: *Item*, Because, contrare to law, the equall halfe of Kirkhill's estate, by tailzies, and backbonds, and other such fraudulent means, hath been conveyed away from the Ladie Kilmawers and hir daughter, (to whom the halfe of the succeffion, by the laws of God and nature belonged,) and are enhanced by my Lady Cardrosse and hir Lord, &c. *Vide infra*, page 126 and 156.

No. 300, p.  
112.

22 *Januarij* 1680.—Their is a wager betuixt 2, that one of them shall pay 100 dollars if such a ship arrived at Leith on such a day before 11 a cloack at night; the ship comes in much sooner, and before 11 a cloack at night goes out of the harbor again. The party promiser being perswaded for the 100 dollars, alledged he was free, for the ship was not ther at 11 a cloack at night. Answered, It was ther sooner, which satisfied the condition, and the *tempus adjectum* was in his favors.

No. 313, p.  
117.

31 *Januarij* 1680.—In the action betuixt Hamilton of Bangour, and Mr. Alexander Hamilton, upon the Ladie's lifrent, a bill having been given in against Mr. Will<sup>m</sup> Hamilton, advocat, for exhibiting summarly some writs in his hands because he was a member of the house; the Lords, *maxime refragante Præfide*, refused it, because he had not thesse papers configned in his hands as ane Advocat, but as unkle and tutor to the children, and heir was to be considered *tanquam quilibet*.

No. 315, p.  
117.

*Eodem tempore*.—At Privy Councell, Mr. William Moir of Hilton, Advocat, perswaded Udney of Auchterallan for defacing and destroying his desk in the church of Ellon, wheirof he and his authors had been thesse 30 or 40 years in possession. The affair was remitted to the Bisshop of Aberdeen.

No. 320, p.  
118.

4 *Februarij* 1680.—Duke Hamilton raises a declarator against the toune of Lithgow, that he had the liberty and priviledge of a free port and harboury at his regality of Borrowstouneness, and might load and unload ther, notwithstanding that the King's custome house, which had been thesse 30 years at Borrowstounnes, is now removed to Blacknes, and that the toune of Lithgow are building a peir and harbory at Blacknes. Alledged by the 84 Act Parl. James 4 in 1503, and 24 Act Parl. 1633, the merchands most only pack and peill at free burrows; now, loading and unloading is the same thing with packing and peiling. This was denied by the Duke's advocats, who called packing, the stowing of goods in packs, and peiling, they did not agree what it mean't; some thought it was the furing and furing of goods like a pyle wood, and Borrowstounnes

is not a free brugh. Answered, by the 5 A& of Parl. in 1672, brughs of regality and barrony have all the priviledges of brughs royall, except as to some staple commodities, and so may load and unload. 2<sup>do</sup>, Blacknes is not so commodious a haven as Borrowstounesse is. Replyed, Since that fatal A& of Parl., the Borrowes have ever reilled as exceedingly abridged in their priviledges; but it does not extend to this case, and Blacknes is a more convenient station for ships. This being advised on the 10<sup>th</sup> of Februar, the Lords, before answer, ordained a visitation to be made of both harbories, and whither Blacknes is a more capacious and secure receptacle for ships then the other; as also probation to be led anent the town of Lithgow's possession, and custome of going, loading, or unloading at Blacknes, or Borrowstounesse.

6 *Februarij* 1680.—W<sup>m</sup> Naper of Wrichts-houfes being dead, one John Thomson, ane officer in Edinburgh, being sone to W<sup>m</sup>'s grandfather's brother's daughter, gave in a bill to the Lords showing his right of blood, and craving the cornes, cattell, and other plenishing on the ground and house which ware perishable, might be sequestred in ane responfall man's hands till it ware found who had best right. The Lords granted this. Then the Ladie Spencerfeild pretending shee was nearest in blood, (but now it is alledged the person from whom shee couples hir right was a bastard,) and competing, ther ware mutuall bills given into the Lords by ather craving that their witneses (who ware very old persones) might be examined to instruct ther propinquity of blood. The Lords refused this; but ordained the witneses to be examined the tyme of the service before the inquest. Then, by bills, they craved, leif one should steill furth breives clandestinely, the other not being present, and so serve theiron, that the Lords would ordaine them to be summoned therto. The Lords discharged the Director to the Chancery to give furth any breives for serving any of the parties contending till such tyme as they first report to him ane instrument, bearing that they have intimat by ane nottar to the other party concerned, both the day, place, and judge before whom they are to serve, that they may compeir and object if they please.

Upon ane apprehension that ther was not an air within 10 degrees, Mr.

Andrew Foster got the gift of his *ultimus hæres* for the Earle of Murraye's behooff; and the service being affixed to the 19 of March, and 3 Lords joyned as assessors to the macers on the said 19 day, the King's Advocat compeired for the donator's interest and produced his gift, and craved up the verifications of the contingency by writ, and the names of the witnesses, to see till another day; which, tho unusuall, yet was granted, and the service was continued till the 23 of March; before which day ther was ane advocacy of it past to the Lords, only to delay and wearie out the poor man, pretending that intricat points would arise on the probation, which none could decide but the Lords; yet ther was no such difficulty or importance but what the 3 assessors might have determined. *Vide infra* thir same parties, page 146.

No. 328, p.  
120.

6 *Februarij* 1680.—At Privy Councill, a great debate is started by Sir George Mackenzie of Tarbet, Justice-Generall, anent the præcedency of his office, wheirby he acclaimed the place before the President of the Session, the Register, and all the inferior officers of State, which he founded upon the dignity of the office in ancient tymes. But then many civill matters, which ware determined by inquests, belonged to it. 2<sup>d</sup>, They were ordinarily noblemen who possessed it. Nixt, he produced the extract of a letter out of the books of Privy Councill, sent by the King to them in 1637, ordaining the Lord Justice-Generall to have the same præcedency which the Lord Chieff-Justice in England posselles, who is *primus Judicium post regni Cancellarium*; and promises to ratify it in the nixt Parliament; but it was never done, and some thinks it will be decided against Tarbet.

No. 330, p.  
121.

*Eodem tempore*.—At this same tyme, Burnet of Craigmyle, gives in a complaint to the Privy Councill, against Sir Alexander Forbes of Tolquhon, for praetising his mother-in-law, and by privat and indirect methods procuring from hir exorbitant gifts and rings, and dispositions of what otherwayes would befall to him.

No. 331, p.  
121.

9, 11, & 12 *Februarij* 1680.—At the Criminall Court, proces of forfaitor is led against — M'Dougal of Freuch, for being at the late re-

bellion in June laft, (Grahame of Claverhoufe hath gotten a gift of this forfaultor.) The probation was led in abfence, conforme to the 110 A& of Parliament 1669; and for fecurity, the witneffes to the execution were fworne. They were cited by found of trumpet with the heraulds and purfevants with their coats on; and the doome of forfaultor being pronounced with found of trumpet, their armes drawn in colours, ware torne and trampled on under foot, and then pofted up reverfed downward, and they declared traitors, by found of trumpet, over the Croce of Edinburgh, and their armes reverfed affixed upon the faid Mercat Croce and other publick places.

10 *Februarij* 1680.—At Privy Councell Thomas Robertfon and 15 or 20 mo brewars ware fyned, fome in 500 mks., fome in 300 mks., for not brewing fufficient 16 penny ale, and not giving in bonds to brew conforme to the price of the vi&tuall, and to buy vi&tuall by weight; tho it was represented in the debate, that the buying by meafure was eftablifhed by A& of Parliament, and fo it could not be altered by any A& of Privy Councell. (*Vide fupra*, page 106.) *Item*, Peter de Bruis Flandrian gave in a complaint againft the Earle of Winton anent the building of a harbor at Cockeny, craving that the Lords of Privy Councell would nominat fome to vifit it, and vifit his pains, and modify againft the Earle accordingly. The Lords at firft named a committee, but therafter they remitted it to the feffion, the judge ordinar, to be fummariy difcufft by them. No. 332, p. 121.

19 *Februarij* 1680.—Gordons, elder and younger of Earlefton, Gordon of Crachelay, and Binnie of Dalvenan, are forfault in abfence, and ther armes torne and pofted. No. 349, p. 124.

23 *et* 25 *Februarij* 1680.—At the Criminall Court the abfents from the King's hoft in June laft, to the number of 35 gentlemen of Fyffe, are now pannelled. *Nota*,—This is not the third part of theffe who ware abfent in this fhire of Fyffe, and ther is another indytment raifed againft the reft. (*Vide* more of them perfhued *infra*, page 146.) They proponed firft generall defences; and Alledged, That they having No. 359, p. 126.

put out their militia, they ware not in law tyed to attend in perfon, the Parliament having consented to the militia in place of that servitude. This was not sustained. 2<sup>do</sup>, Alledged, The proclamation calling them out was not published at the severall mercat croces, as it expressly bears and appoints. Answered, Their privat knowledge supplied that defect.

Their particular defences founded on specialities, ware first,—That some ware then sick. But the Lords fand testificats from ministers, phyficians, officers of the army, &c. not sufficient, without witnesses ware adduced by ane exculpation, for *testibus, non testimoniis, est credendum*. (See in a 4<sup>th</sup> manuscript, pag. 13, a pleasant story in *Philip Cominæus*, how Lewis the XI of France fyned some gentlemen for flieing from his host against the Duke of Burgundie; and they offered to prove, others ware spared who fled 9 miles further off then they did.) 2<sup>do</sup>, Though phyficians pretend a priviledge not to testify upon soull and conscience, yet the Justices declared they would reject all testificats that wanted it. Nixt, It was alledged for some, that they ware past the age of 60. This was found relevant, they proving it instantly, providing they had sent out their best horses and their best men weell appointed. 3<sup>do</sup>, Some pretended they ware officers of the militia, and went out with it, or that they had lands in another shyre, and answered ther. Thir ware found relevant. 4<sup>th</sup>, Hay of Balhouffie founded his defence on a passe to returne, from the Marquis of Montrose, his superior officer. Answered, He not being in the King's guard, Montrose was not his officer. 2<sup>do</sup>, Commanders have no power to give them licence to desert, else the halfe of the army may be dismissed thus. . . .—5<sup>th</sup>, Alledged for Ayton of Inchdarnie, that he was *in recenti luctu*, his only son having been killed some few dayes before, upon a mistake, as if he had been one of the Archbishop of St. Andrews his murderers, which he was not; and *Novella: Per novem dies non inquietetur qui proximi funus duxerat*. 6<sup>th</sup>, Some pretended ther wives ware then lying dangerously sick, or neir the time of ther delivery, or that ther wives opposed and contradicted ther going. This, in law, is not relevant. 7<sup>th</sup>, It was alledged for others, that ther houses, ther armes, and ther horses, ware robbed and plundered, and so they nather could, nor ware oblidge in law to go on foot; and they could not at that tyme get other horses to



buy, they being all picked up. Because ther was a presumption of simulation in this robbing, that it was caused to be done by themselves, or at leift by ther wives, to hold them at home ; theirfor, the Declaration was proffered to them, as a testification of their loyalty, if they took it. But fundry of them declined it, and offered to purge themselves upon oath that ther was no collusion. Yea, some apprehended that ther defence upon sicknesse, at such a tyme as this, might be simulat. 8<sup>o</sup>, Some denyed they ware heritors, and so ware not oblidge to attend with the gentry. The Advocat craved they might then renunce all their heritage to the King, *ad remanentiam*. Answered, They ware not oblidge. Replyed, Wher one is pershued for taxation, and denies he is ane heritor, then the Lords of Session oblidges him to renunce. 9<sup>o</sup>, Some alledged they ware only appearand heirs, and not infest, and ware in possession of nothing, but all was lifrented. Answered, The right of apparency forfaults by the 69 A& of Parliament in 1540 ; and so the King hes right to what they might succeid to. I hear wheir ther was a lifrenter and a fiar, the fiar was found liable to attend the King's hoist, and bear the expence of sending men : yet it would seeme much more æquitable that the lifrenter who possesse should be liable for the *onera fundi realia* then the fiar. 10<sup>o</sup>, Alledged for some, They ware only wodsetters, or only possessed *jure mariti*, or by the courtesy of Scotland, wher they had married ane heretrix, and so ware not heritors. Answered, Since the law was so courteous as to give them the courtesie, they ought to be so discreet and thankfull, as to defend the law and their oune country, and a courtifier was *jure feudali et dispositione juris, vasallus pro tempore, et ad tempus* ; and so was liable to all services. *Queritur*, If a blench wassall, who payes his *reddendo pro omni alio onere*, may plead exemption from hofts and raids? certainly he cannot. 11<sup>o</sup>, It was alledged for some, That they had no inheritance, but only some burrow crofts and ruides, and within 100 lb. Scots of yearly rent, and so ware not bound to goe out in person with the heritors, their rent not being able to sustain them as horsemen. Though they should goe and protect their oune property, yet this exception seemes very relevant. I hear the Lords affoizied them whosse heritage was within 300 mks. yeirly, as not being able to keep a horse on that rent. But what if

they have a good fortune *aliunde* in money? Some make a 100 lb. Scots of valued rent the rule; and if they have under that, then they are not obliged to attend hofts and raids. The old criminall adjournall books mention fundry excuses for such as absented themselves from hofts and raids. 12<sup>o</sup>, Some alledged they ware merchants and burgeffes within a brugh royall, and watched ther. Answered, Since they ware landward heritors, they ought ather *refutare feudum*, or else serve the King for their land. The bourgeffes of Paris, and officers of the Parliament ther, are exeemed from Ban and Arriere-ban; (which is the attending the King's hof; ) see Claude Ferriere's *Traité des Fefs*, page 18. 13<sup>o</sup>, It was contended for some, that it was *res hactenus judicata*, for they had been summoned to the Circuit at Couper, and had ther gotten absolvitors. Answered, The dyet ther was only deserted, and that hindred not the raising of new letters. Replyed, It was more then a deserting, for it proceeded upon triall of the relevancy of their excuse; and being found just and proven, it was admitted, and they affoilzied. 14<sup>o</sup>, Alledged for some that ware absent from the bar, that they ware lying sick, or that they ware dead since June last, or that they ware within 16 years of age; for the law condescends on all heritors betuixt 16 and 60. But thesse ware repelled as not instantly verified, and they ware fyned. 15<sup>o</sup>, Some alledged, as Fordell Henderson, &c., that they ware of unquestionable loyalty, but ware unable to travell on horseback, for the gout, gravell, &c., but they sent one more sufficient then themselves. Answered, Their serving *per substitutum*, did not exoner: (which see debated by Craig, *diegesti* 1. *libri* 3, *Feudorum in principio*.) 16<sup>o</sup>, For Lindsay of Dowhill alledged, that, by a command of Privy Councill, he was ordered to attend them and their dyets, at the same very tyme that the heritors ware called out. Answered, *Posteriora derogant prioribus*, and the proclamation calling the heritors out, was after that act of Privy Councill, anent him; and he should have obeyed the last. Replyed, Their proclamation was only generall; their order for his appearance under the paine of 10,000 merks, (which was uncertain when they might call for him,) was speciall, and *in toto jure generi per speciem derogatur: L.* *D. de Regulis Juris.*

Befydes the forsaied remarks, having got ane summary Abbreviat of the

defences and debate, with the Interlocutors following thereon, as they are recorded in the Criminall Adjournall Books, I thought fitt to insert them also for the more superabundance here. The first generall defence is, that the 4<sup>t</sup> A& of the 1 Parliament King James I. founded on, anent the refusing to inforce the King against nottor rebells, most be construed and understood only of rebells ather convict or declared fugitive; and the 25 A& 2<sup>d</sup> Parliament James II. relates only to weaponshawing. 2<sup>do</sup>, That the proclamation was not intimat to the heritors and liedges at the Mercat Croce of the head brugh of the shire of Fyffe. 3<sup>o</sup>, That the forsaid old A&ts ware made when the King had nather standing forces nor militia; but now having both, the subjects ought to be exoner'd, and the saids A&ts not be founded on. 4<sup>to</sup>, The King hes indemnified severall crymes, except those who did not assist his host. But they who sent out their servants and horse did assist, &c. and so are pardoned, and cannot be persued. 5<sup>to</sup>, They founded on a letter, alledged written by the Chancellor, in name of the Secret Councill, allowing such heritors as ware valetudinary, wanted horses, or had any other reasonable excuse, to stay at home and guard the country.—Thir 5 generall defences ware all repel'd.

Then they came to the speciall defences; and it was alledged for

Bouffie,—That he attended the host with servants and horses, weell armed; but being valetudinary, he procured a passe and licence to returne home, and left his horses and servants in his Majesty's service.

Hamilton of Kilbrachmont's defence is,—That his horses ware robbed from him by the rebells, and his servants ware sick; yet he furnished himselfe with horses, and followed the Fyffe heritors to have served the King, but they ware returning after the victory; and he offered to take the Declaration.

Law of Brunton's defence was,—That he was sick and bedfast all the tyme.

Nairne of Little Friertoun's defence was,—Sicknesse, and that all his estate was liferented by his mother.

For Lundy of Stratherlie,—That his horses ware robbed by the rebells; and he was content to take the Declaration.

Sir James Sinclair, Kinninmond's, and Balbirnie's defence was,—Sicknesse all the tyme of the host.

Beaton of Bandon's defence is,—His ladie's dangerous sickneffe, his sending his servants and horses to the army, and his taking the Declaration.

Fordell Henryfone's defence is,—Corpulency, infirmity, and inability to mount a horse without help, or to abide the fatigues of a camp, and that he sent servants and horses.

Melvill of Cassingraye's defence was,—A licence from the captain to stay at home, his lady being sick, and he wanting horses.

Durhame of Largo's defence is,—His horses ware robbed by the rebels; he offered to rescue them by force, or to redeime them with money, but could not have them. He offered to give his oath that this was not collusion; but refused to take the Declaration.

Cowan of Corfton's defence is,—His horses ware taken away; he is no heritor, but only possessor and factor of ane estate for his owne payment, and the payment of other creditors; but he refused the Declaration.

Balcanquall of that Ilk's defence was,—That his horses ware robbed; but shunned to take the Declaration, for fear of disquiet from his wife.

Nairne of Sanfurd's defence is,—That he sent his servants and horses; and being a captain of foot, he endeavored to convene his company, but none coming save ten, his collonel adjoyned them to another company; and so his horses being gone before, he could not get himselfe furnished tymeously with others: and he refused the Declaration.

Moncreiff of Reidie's defence is,—That his ladie being sick, he sent ane expert fouldier with his horses, who ware accepted of; and he had offered to goe himselfe if they had not been receaved; but he refused the Declaration.

Weymes of Glennifton's defence is the same with Sanfurd's.

Young of Kirkton's defence is,—His ladie's dangerous sicknes, and bitter curses if he should leive hir; and the appearance of abortion upon his offering to goe from hir; but he refused the Declaration.

Murray of Pitlochie's defence was,—That he bruiks his litle estate by the courtesie of Scotland, and the air is on life, &c.

For Dr. Sibbald—(See physitians exemption by the Imperiall Laws, *toto titulo Codice de Proffessoribus et Medicis libro 10, titulo 52.*) The Lords

inclined to think any eminent physicians were exempt as to personall attendance, but thesse who ware salariat to attend the army, only they should have sent.

For Muirhead of Linhouse—It was alledged he was within 14, and so pupill, and could not goe, not being fencible. Yet some thought, in stri& law, his tutors should have sent out a man for the land, even as one that is past 60 should doe.

The Interlocutors ware as follows:—The Lords Justice-General, Justice-Clerk, and Commissioners of Justiciarie, having considered the libell and debate forsaide, they repell the 1st, 3d, and 4th, generall defences *simpliciter*; as also they repell the 2d generall defence, in respect of the intimation made by my Lord Newark, at the rendezvous of the Militia, conforme to the tenor of the proclamation, and of his appointing a rendezvous of the heritors at Levin; which accordingly was kept by a great part of the heritors. And as to the 5<sup>th</sup> defence, founded on the Chancellor's letter, the Lords superceeds to give determination theirupon, as it is proposed in generall for all, reserving to themselves to determine theirupon, as occurs in particular. As also, they find the defence proponed for Thomas Hay of Bouffie, founded on the passe alledged on, relevant to affoilzie him; and remits the samen to the knowledge of the affise. They also find the defences proponed for Robert Hamilton of Kilbrachmont, James Law of Brunton, Mr. Alexander Nairne of Little Frier-toun, Lundie of Stratherly, Sir James Sinclair of Kinnaird, Kinninmont of that Ilk, David Beaton of Bandon, Sir John Henderfon of Fordell, Robert Balfour of Balbirney, James Melvill of Cassingray, &c. relevant. As also, finds the defences proponed for Alexander Durham of Largo, Charles Cowan of Corfton, David Balcanquall of that Ilk, Alexander Nairne of Sanfuird, George Moncreiff of Reidie, and David Weimes of Glennifton, relevant only to alleviat the punishment, though not *in totum* to elide the libell, according to his Majestie's gracious letter. Then the Lords repelled the defences proponed for James Young of Kirkton, and Murray of Pitlochrie; and therfor fyned them in two years valued rent.

Largo, Corfton, and Balcanquell, ware unlaured in one year's valued rent. Sanfuird, Glenifton, and Reidie, ware americiat in halfe a year's

valued rent.—The dyet was deserted as to Howburne of Menstrie, and Gideon Murray of Pitkeirie, and others, it appearing that they were past the age of 60; so ther is small rounge left for that quæstion, whither *annus sexagesimus inchoatus*, (as being *in materia favorabili*,) will excuse, or if they most be 60 complet.—The Declaration was offered to none whosse defence was sicknesse, or who had any other defence that put them beyond a possibility of attending. *Vide infra*, page 142, at the 6<sup>t</sup> of March 1680; the Louthian gentlemen who ware absent are pannelled, and the priviledge of Advocats exemption from raids and hofts is debated.

No. 363,  
p. 130.

25 *Februarij* 1680.—There being a great clamor and outcry against the extortion used at the Chancellary, the Lords appointed a visitation to be made, and the Register, &c. to try the abuses and exorbitant exactions ther. George Cockburn, the Depute, would not byde the tryall; and so Sir William Ker placed John Campbell the wryter theirin. Some demand why they passe free for byganes, seing we hang men for very small thifts? See more of this *alibi*.

No. 368,  
p. 132.

28 *Februarij* 1680.—The Lords fyned John Inglis, advocat, for beating Captain Gideon Murray, and calling him menfworn, in 500 mks., and ordained him to goe to prifon and to crave pardon.

No. 370,  
p. 141.

2<sup>do</sup> et 5<sup>to</sup> *Martij, et diebus sequentibus*, 1680.—At Privy Councell, a complaint was given in by Mr. Forbes, one of the Regents of the Colledge of Aberdeen, against the Bifchop of Aberdeen and one Mr. Middleton, alledging the Bifchop had, by terror and concuffion, influenced the election of the Principall, and limited the freedome their of, and procured Mr. Middleton to be chosen: *vide titulum D. de Concuffione*. Answered, The Bifchop, by the erection and foundation of the Colledge, is authorized to oversee the elections, and he did nothing but what is agriable to law, *et qui jure suo utitur nemini facit injuriam: L. D. de Regulis Juris*.

2<sup>do</sup>, Upon the proclamation mentioned *supra* in December last, page 106, anent weighing the bear, &c., the Lords of Councell declared they would fyne the taverners if they sold two pence ale; and they are or-

daind to take only ale from one brewar, &c. Wheirupon fundrie of them gave in a bill to the Privy Councill, craving a re&fication theirof. As also some of them came in, and, of ther oune consent, engadged to buy no bear this year, but what they should give two marks for every three stone of barley-bear, and two shillings sterling for every three stone of rough, (which compting fifteen stone to a boll, tho it will be more,) and this makes about ten merks for the boll of the one, and ten shillings of the other.

3<sup>o</sup>, They made the A& discharging the killing of wild-foull, and all hunting, hauking, and fisching, without licence from the Master of the Game for the shires therin nominat, which will lay a foundation for fying.

4<sup>o</sup>, The A& for repoffessing Campbell Earle of Caithness unto the peaceable right of that estate, and that they should furnish him meat and drink as he travels thither.

5<sup>o</sup>, The 5500 men to be modelled furth of the militia : (*de quo supra.*)

6<sup>o</sup>, An A& discharging the importation of brandee, mum, Brunswick-beer, &c. ; and, after the first of November nixt, not to be drunken, as taking money out of the country, and hindring the consumption of our oune beer. It is feared this may be only a designe to palliat a monopoly of thesse liquors.

7<sup>o</sup>, The four districts, or tetrarchies, of the Hielands, viz. Argile, Athol, Huntly, and Seaforth, and each of them, gets £500 sterling *per annum* to keep them quiet ; a fifth is added, viz. the Earle of Murray, by a letter from the King, dividing Huntlie's jurisdiction in two, as too large ; and they are all declared liable for the damage and depredations shall be done within ther respective bounds. But thesse great men will not be very acceffible.

6<sup>o</sup> *Martij* 1680.—At the Criminall Court, some heritors of the three No. 371, Louthians ware pannelled for absence from the King's hoist. James Eleis of Southfyde, Durhame of Duntarvie, and many others, ware fyned, some in 1000 marks, some in 300 marks, some in more, some in lesse, according to their valued rent ; and the Lords proceeded with moderation enough. p. 142.

2. In Mr. William Cheifleye's case, as heritor of Cowburne, the defence of his being a member of the Colledge of Justice was proponed by him, to exeeme him from personall attendance at the King's hoift, and was repelled, as I hear;<sup>1</sup> but it was nather fully debate, nor the A&s in ther favors showen; and theirfor the Criminall Lords continued the dyet against Mr. Thomas Lermont, Mr. James Hunter, and the other advocats who ware conveyened for ther absence, and had got indytments and citations for that effect, and they forboor to infist against them.

It may be alledged for advocats that they are not bound to attend hoifts and raids, at leift in perfon, if they fend a horse and a man in armes for them; and ought not to be pershued for absence theirfrom: *Primo*, Because the Roman law exeemes and priviledges them, *ab omnibus functionibus provincialibus*. 2<sup>do</sup>, They are liberat by an expresse A& of Sederunt made by the Duke of Chattelleraut, Governor in 1545. 3<sup>uo</sup>, In June last, the Lords sat all the tyme of the raid and campagne, and so Advocats could not warrantably desert their clients affairs, contrare to their oath *de fidei*, and of attending the Lords. 4<sup>uo</sup>, By A&ts of Secret Councell then made, the Colledge of Justice ware lifted unto a company to help to guard the toun of Edinburgh, and they choiced their captain, lieutenant, and other officers, and got armes from the Castle, and merched, and drew up, and used discipline.

No. 372,  
p. 142.

*Eodem tempore*.—At Exchequer Sir D. Carnegie of Pittarrow pershues the Montrose burgesfes for 6 pence of every pint of brandee sold and retailed by them, and which was due to his brother James as shireff-depute ther. Alledged, by the A& of Parliament in December 1673, the importer is only liable for that imposition, and not the retailer of it.

No. 373,  
p. 142.

1 et 16 *Martij* 1680.—The Lord Bargeny was both thir dayes upon the pannell; and was, after much debate, continued and sent back to the Castle, on pretence that the Advocat wanted some of his materiall

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<sup>1</sup> *Nota*.—This makes not against the Colledge of Justice; for Mr. W<sup>m</sup> Cheisley is deprived from being a Wryter to the Signet: *Vide supra*, p. 127.



witnesfes for proving the indytment againft him. As alfo, he gave in fome additionall articles, anent his furnifhing men with armes to the late rebellion : See his dittay befyde me.

13 *Martij* 1680.—The Lord Macdonald boasts Sir W<sup>m</sup> Sharp, and threatens to cut the ears out of his head for delaying to pay him his pension, albeit the Councell had put a ftop to it ; for this a councell is called, and he gets a moderat rebuke. No. 374, p. 143.

2<sup>do</sup>, The Chancelor goes for London.

28 *Martij* 1680.—Craigie dyes ; and, 8 *Aprilis*, Mr. Maitland is made Juftice-Clerk ; *de quo vide alibi*, my other MS. for the Seffion tranfactions. No. 376, p. 143.

8 *Aprilis* 1680.—At Privy Councell, John Kennedy, apothecary, and one Levifton, a merchand in Edinburgh, are fyned ; the first in 100 lb. Scots, and the laft in 300 merks, (becaufe he had no licence,) for baptizing ther children in the toune, by one Mr. Gilbert Reull, a licenced and indulged minifter ; tho Mr. A. Turner had granted his permiffion for the doing therof ; for which he was alfo rebuked by the Archbifchop of St Androis, his ordinary, the Bifchop of Edinburgh, being at London for the tyme ; and Mr. Reull is fent to the Baffe, becaufe he knew, by his Majeftie's indulgence, they are refticted not to ufe any part of ther minifteriall fun&tion within Edinburgh, nor tuo miles about it ; and Mr. Turner's confenting cannot excufe him. Theirafter, in May, the Secret Councell was willing to change his confinement to the toun of Edinburgh, he finding caution not to preach in private ther ; which demand, as being contrare to their principles, he refused to doe. No. 377, p. 143.

*Eodem die*.—James Juftice of Eaft Crichton exhibits a complaint againft Hepburne of Humby, for contraveining a prior A&t of the Councell, and teilling up a grein hard before the faid James his houfe, which is indeed built very neir the march, as many houfes of old ware fituat. Humby was difmiffed with a rebuke. No. 378, p. 143.

No. 379, p.  
144.

*Eodem die et 6 Maij* 1680.—Ther ware mutuall libells by John Sleich, proveft of Hadington, and George Cockburne, bailzie ther, againft one another, for verball injuries and calumnious expreffions. It was referred to freinds.

No. 380, p.  
144.

*Eodem, 6 Maij*.—The S. Councell revocks their former A& in Februar 1677, (fee it in my other manuscript, *folio 278 in calce*,) anent the Admiralty diftricts, and allows only Paffes to be given by the Admirall and his clerk, and annulls all bygane Paffes otherwayes ifhued furth; which is hard, being done in the faith of that A&.

No. 382, p.  
144.

3 *Junij, post meridiem*.—At Privy Councell, Bargeny liberat, he find- ing caution to appear when called, under the pain of 50,000 merks.

2<sup>do</sup>, The names of the officers of the new 5500 men, modelled out of the militia, ware red, and the King's nomination of them approven; and fix houfes in the weft appointed for garrifons, viz. Craigie, Blarquhan, &c.; and the King's letter declared, where he gifted forfaultors, he reserved always the houfes standing on the forfault lands for his ounne peculiar ufe. He likewayes gave Generall Dalzeell a commiffion of Jufticiary, with the advice of nine others, to execute juftice on fuch as ware in the late rebellion at Bothuel Bridge, and did not take the bond within the firft of January laft, which day was limited to them, and claffed the feveral delinquents accordingly.

3<sup>tho</sup>, The toune of Innerkething is conveyened to pay a fine, becaufe of a Conventicle lately kept within ther toune. Ther defence was, that the houfe in which it was held doth not belong to the toune, though locally within it, but holds feu, bears burden with the fhire, and is not countable to the toune's jurifdiction, but appertains to my Lord Dumfermeling and Tuedale. The Secret Councell granted them diligence to prove this.

No. 385,  
p. 145.

4 *Junij* 1680.—A Councell was called extraordinarily upon the news of the ryot committed by fome weemen at Queensferry, who refcued from fome of the King's forces one of the minifters who preach at the Field Conventicles, called Mr. Donald Cargill, and one Henry Hall, a fewar in

Teviotdale, who was wounded and taken, but dyed of his wounds; only their papers were seized on, and a new covenant, which was printed. The Councill sent Generall Dalzeel with a party, to make all the strict inquiry he could to apprehend Cargill the minister, and to take them prisoners who had defended them. See more of this in another 8vo. MS.

8 *Junij* 1680.—This day, a letter from the King to the Session was red, reannexing the nomination of the clerks of the Inner House to the Register Office again, in regard the former letter, in Jullie 1676, disjoyning it and giving that power to the Lords, was obtained when there was no Register. No. 386,  
p. 145.

*Eodem die*.—The Airs of Wrightshouses (*de quibus supra*, 6 *Februarij* 1680, p. 120) craving by bill that their witnesses might be examined, (they being old, and one of them dead since the advocacy,) for proving their contingency of blood, seeing the rest might likewise die before the discussing of the advocacy from the masters to the Lords: The Lords refused the bill, because the masters would regard no testimonies of witnesses but them that were examined in their own presence. It was moved, by one of the Lords, that the masters and assessors might convey the assise, and in their presence might take the probation to lie *in retentis*, and proceed no further. This was also refused, because the advocacy standing undiscussed superceeded all procedor; and the roll of causes being far advanced, it would come in within a few weeks, and the testificat of the witnesses age and infirmity did not bear upon foul and conscience. This was judged by some hard measure, to gratify the Erle of Murray. No. 388,  
p. 146.

24 *Novembris* 1680.—The advocacy against John Thomson, the air of Wrightshouses was this day discussd, and the service remitted back againe to the masters, with this caution to the inquest, to see the probation be clear as to the contingency of blood; and accordingly, [December 22d] the inquest served him air, tho one of his witnesses dyed *medio tempore*. No. 480,  
p. 169.

10 *Junij* 1680.—At Privy Councill, by a letter from the King, the Indulgence was discharged within 12 miles round about Edinburgh; with sundry other things, which see *alibi* in another manuscript. No. 392,  
p. 146.

*Item*, A Commiffion of Jufticiary is appointed in every fhire to put the Laws anent the going to the church, and all the other ecclefiaticall acts of Parliament, in ftrict execution.

No. 394,  
p. 146.

14 *Junij, et multis diebus seq.* 1680.—At the Criminall Court, many Fyffe gentlemen, not contained in the former lift of the 23 and 25 of Februar laft, (*supra* p. 126,) are now perfhued for their abfence from or deserting the King's hoft laft fummer. It was proponed for one Bonnar, and fome others, that they ware intercommoned, the tyme of the proclamation calling furth the heritors to Bothuell Bridge; and fo might not goe, not having a fafe condu&t; and they ware not fubjects, who ware only called out, and they could fend none, feing none might converfe with them. Answered by the Advocat, It was *ex propria culpa* they ware intercommoned, and, *nemo debet ex sub dolo lucrari*; and they might have applyed to the Privy Councell to goe. Replyed, They are now indemni-fied for the faid intercommoning, and it ought not to be now objected, or to be prejudiciall to them. The Lords would not fustain the defence as fufficient to affoilzie them *fimpliciter*, (which was thought hard,) but only to alleviat; which courfe, alfo, they took as to Alexander Pitcairne of that ilk, his defence of being a merchand, and late magiftrat in Edinburgh; and with Mr. Andrew Hedderwek of Pitcullo, who alledged he had fallen and hurt his leg a litle before, in refpect it did not appear but he might have waited on the hoft for all that: therfor, they ware fyned, but not to the full extent. Calderwood of Pitleddy, and many others, ware alfo fined.

No. 396,  
p. 147.

17 *June* 1680.—At Privy Councell, the 5500 men's order, and their rendezvous appointed.

No. 404,  
p. 149.

22 *June* 1680.—At Privy Councell, the King's letter was red, making the Earle of Queensberry Juftice-Generall, in place of Tarbet; and referring the abfents from the hoft to the Privie Councell, and taking the power theirowt of the hands of the Criminall Lords. This was done, partly becaufe they thought they proceeded too flowly and cautiously according to law; but what mainly influenced the change was, that Mr.

Robert Martin, Criminal-Clerk, might not get all the benefit, but the Bishop of Edinburgh's brother, Mr. William Paterfon, one of the Clerks of Privy Councill, might get a share of it.

*Primo Julij* 1680.—At Privy Councill, George Clapperton of Wily- No. 418, cleuch is ordained to exhibit one Penman, a lasse of 14 years oId, with <sup>p. 152.</sup> whose mother he conversed scandalously, and did not educat the girle according to hir means. The Lords ordained the maid (tho shee compeired and declared hir willingnesse to stay with Clapperton) to be placed for 3 moneths with one of the ministers of Edinburgh, that during that tyme, shee being free, might elect curators and choice to live wher shee pleased.

*2 Julij* 1680.—Robert Baird, late dean of gild of Edinburgh, &c., are No. 422, perswued by Mr. John Maitland, master of the game in Mid-Louthian, for <sup>p. 153, § 2.</sup> eating wild foull, contrare to the late Act of Privy Councill. Alledged, Being burgessees of Edinburgh, they are not obliged to answer before the shireff, and the toun hes a privative jurisdiction : See the information on this.

*6 Julij* 1680.—This day, the King's Majesty was served air in speciall No. 424, to the late Duke of Lennox, his coufin ; the 14 eldest Lords of the Session <sup>p. 153, § 1.</sup> ware the members of the inquest ; and the Lord Chancellor was Chancellor to the affise ; the 4 maisters ware judges : this was done to make a right of conveyance of that estate (wherof ther was not much left) to his naturall sone, Dom Carlo. (See Craig, Feud. pag. 110, wheir he tells King James succceeded to the Duke of Lennox at that tyme.) Some called this service ridiculous and unnecessarie, and thought the *jus coronæ* supplead all thir solemnities in the King's persone.

*Eodem die.*—At Privy Councill, the Chancellor's patent, as Duke of No. 424, Rothes, was red ; and by a letter from the King, he is appointed, as Chan- <sup>p. 154, § 2.</sup> celor, to be first President of the Councill, above him who hath that title. By another letter, the Earle of Roxburgh is admitted a Privy Councillor.

*8 Julij* 1680.—At Privy Councill, the Hyland districts, by a letter No. 426, from the King, are suspended and laid asyde for a tyme, in respect it was <sup>p. 154.</sup>

thought the King's forces might keep them in peace, together with the engagements of the heads of the Clans for all that lives under them, conforme to our old laws.

No. 428,  
p. 154, § 2.

9 *Julij* 1680.—At Exchequer, upon a letter from the King, a pension is paid to Mr. John Paterson, Bishop of Edinburgh, of £100 sterling *per annum*, during his lifetime. *Item*, There is a letter from the King red, shewing his religious and pious inclinations, and how, to defraud the Bishops quots, men took the gift of defuncts escheats; theirfor, he appointed no such gifts to be paid, till first the party took the declaration. 2<sup>do</sup>, That the gift ware expressly burdened with the quote; that, by such artifices, the Bishops might not be disappointed of their just dues.

No. 429,  
p. 155.

13 *Julij* 1680.—At Privy Councill, John Dundas of Jerviston was fined in a year's valued rent, for deserting the King's host, because he had not fully proven his excuse, viz. That he had, with bad usage, taken a great swelling in his legs.

No. 434,  
p. 156.

15 & 16 *Julij* 1680.—One Niving, the master of a ship, was pannelled [at Criminall Court] for using some rash expressions against the Duke of York, viz. That he was on the Popish plot of taking away the King's life, and overturning our religion and government; and that he was to consent to the bringing over the French King with ane army into Brittain; and that he had come himselfe to Scotland, to make a Popish faction ther. This was spoke in cups, and with some qualifications; yet he was convened on the A&ts of Parliament against leeing-makers betuixt the King and his peeple; though it was objected thesse A&ts did not meet this case, he neither having lyed to the King of his peeple, nor to the peeple of the King; and at the most, it was but *scandalum magnatum*; and in England such a proces would be laughed at. Yet his defences ware all repelled, and the dittay found relevant, and the libell sustained and admitted to probation, and he put to ane affize, whereof 7 clenged him, and 7 found him guilty; and the ballance thus standing equall, Provost Binny, Chancelor of the Affize, found him guilty; albeit the dittay was nather

relevant in itselfe to infer the pain of death, nor was it proven against him; but this was done to fright England, and to gratify his Royal Highnesse. But the moderation of *Lex unic. Cod. si quis Imperatori maledixerit* is more commendable, and such a practise should not be standing on record. It is true, he deserved a severe punishment, but law cannot stretch it to death. The pronouncing of sentence was delayed till the 4<sup>th</sup> of August; on which day, they ordained him to be hanged on the 18<sup>th</sup> of August thereafter. But the Judges knew the King, by the Duke of York's mediation, was sending a remission, at least a letter converting the sentence to banishment, and confiscating his ship and all his goods, but preferring his creditors therein to his self. See my Historick folio manuscript, on James Skeen's death, in December 1680, p. 5.

20 *Julij* 1680.—At Privy Councill, Arthur Forbes is perswaded by the No. 438, Master of Salton, and one Mistris Gordon, for violent taking possession of p. 157. a house whereof shee was wofsetter, without having a decreet of removing or ejection; whereupon probation having been led, the Councill found Arthur in the wrong, and imprisoned him.

*Item*, Ther ware mutuall complaints given in to the Councill by the two Proveests of Perth, Hay and Thriepland, for beating one another in the hy streets ther. Threipland's brother was rejected from being a witnesse, and some who had told before-hand what they had to depone ware received *cum nota*.

26 *Julij* 1680.—The King's customes are fermed, as also the Stewartry No. 443, of Orkney; of both which see in another manuscript. p. 159.

28 *Julij* 1680.—One of the prisoners brought in from Moorkirk with No. 446, Rathillot, wher Cameron the feild-preacher was killed, was this day, at p. 160. Privy Councill, tortured in the boots, he having been a chapman, and carried their letters. The Bischops at this, as a sanguinary case, retired furth of the Councill.

*Eodem die*.—2<sup>do</sup>, Ther was likeways ane A& of Sederunt made anent No. 447, notars, and a motion, that the Clerks of Session should all be admitted p. 160, § 2.

nottars; which was thought a disparagement, feing they *in actibus officij* are more trusted and credited than notars are, and in extrajudiciall matters they will not negotiate as nottars: This was moved to bring in some money to Laurence Oliphant, now clerk to the notars, and to the Register his constituent.

3<sup>th</sup>, At Exchequer, Alexander Anderfon, bailzie in Edinburgh, was præferred to Andrew Bruce, merchand, in the escheat of one Biccarton, who was neirest of kin to Andrew's first wife, and so laid clame to a 3<sup>d</sup> of the conquest during hir tyme, conforme to his contract-matrimoniall.

No. 448,  
p. 160.

29 July 1680.—At Privy Councell, Fletcher of Salton, Sinclar of Stevinson, and Murray of Blackbarronie, are pannelled for seditiously and factiously oppofing, at leift obstructing, his Majestie's service, in putting the A& of Privy Councell to execution for levying the 5500 men out of the militia. They shew the difficulties and scruples they meit with in rendring it practicall; (which see in the Informations.) The Councell did not fine nor imprison, as some expected, but only rebuked them; and upon the Councell's a&, ther ware charges of horning directed against all the heritors they suspected, charging them to meet and stent themselves according to their severall proportions of thesse 5500 men. Some thought, in a matter of this concerne, the Commiffioners of the Militia ought not to take upon them to lay a tax upon the rest of the gentry, but they ought all to meet; for *quod omnes tangit ab omnibus debet approbari, et volenti seu consentienti non fit injuria*. But since the State finds the Commiffioners so ill to manage, the wholle heritors would be more unbridled; and thir charges of horning ware a new style. (*Vide infra*, page 163.)

No. 449,  
p. 160.

30 Julij 1680.—D. Hackston of Rathillet was condemned, and that same day execute in a most severe manner; which see, with many remarks, in an octavo manuscript, p. 191, *et multis sequentibus*, till 210.

§ 2.

*Eodem die*.—At Exchequer, Lylle, reli& of Home of Bellita, and James Home now hir husband, put in for a gift of tutorie-dative to hir children of the first marriage, in name of Mr. Hary Hay. Alexander Home of Sclaithouse being served tutor of law to them, compeirs for his



intereffe, and produces his gift. Alledged, It is null, he not being the neareft, and they had a redu&tion of it raifed; for he was not *proximior agnatus*, in fo far as he was only related to them by his mother, who was their aunt by their father, which is cognation and not the agnatick line.

1. *Institutio de legitime Agnatorum tutela*, which fays exprefly, *Amitæ tuæ filius non eft tibi agnatus, fed tantum cognatus*. The Lords of Exchequer rejed&ed the tutorie-dative as long as the fervice of a tutor in law flood unreduced and untaken away; for, as tutor *testamentarius præfertur legitimo*, fo tutor *legittimus femper excludit dativum*.

31 Julij 1680.—The Lords of Seffion gave their confent to the new No. 453, gift of impofition, granted by his Majefty to the Toune of Edinburgh for <sup>p. 161.</sup> 22 years, of 2 pennies Scots upon every pint of ale fold within the Toune; and the Advocats (wheirof few ware prefent, being the laft day of the Seffion) being called in, and this intimat to them, and they not protefting againft it nor oppofing it, their filence was repute for a fufficient confent. The reafon the Toune required the affent of the Colledge of Juftice, was in refpe& they had the Toune, by contract in 1669, oblidged never to feek a renovation or continuation of that gift on the ale.—The new gift the Toune hes got from the King, is of 2 m&ks on each boll of malt, and not of 2 pennies on the pint of ale, as the former ware.

*Eodem die*.—Mr. W<sup>m</sup> Murray, advocat, having offered to difcover, *ad* No. 454, *levamen et exonerationem confcientiæ*, that he knew his brother, the tutor <sup>p. 161.</sup> of Stormont, had bribed and fuborned witneffes in Annandale and Sir Robert Creighton *alias* Murray's affair; the Lords, in regard he was not able to come abroad throw indispoftion of his feet, ordained 3 or 4 of their oune number to goe to his chamber and examine him *ex officio* therupon; but therafter John Murray the tutor having affured the Lords that he was hypochondriack and melancholy, they appointed him firft to be vifited as to the condition of his health and temper of his body, and he was found to be furious and deeply melancholy.

*Nota*.—See in another manufcript [A 2] in 4to, many obferves and de- No. 455, p. cifions which I collected in thir moneths of June and July 1680; but not <sup>162.</sup>

knowing their precise tyme, or else they being older decisions, I placed them in the beginning of that manuscript to page 23d their of.

No. 456, p.  
162.

4 *Augufti, seu sextilis*, 1680.—[At the Criminall Court,] Two of the prifoners taken by Earleſhall, at Airdſmoffe, with Rathillet, wher Camron was killed, are this day tryed, and ſentenced to be hanged as traitors at the Graſſe Mercat in Edinburgh, without any other rigor, they being but mean perſones; the one was a Galloway man, called Malcolme, the other borne in Evandale, called Alifon, or Allanſon. The ſentence was execute on them upon the 13 of Auguſt thereafter.

No. 457, p.  
162.

5 *Auguſti* 1680.—Duke Hamilton exhibited a complaint, at Privy Councell, againſt one Ferguſſon for oppreſſion; for he being employed to ſerve [ſeize] thoſe who ware living within the Duke's regality, and had been at Bothuel Bridge, and had not taken the Bond, he ſeized on fundry who ware moſt innocent; likeas, he refuſed to ſhow the Duke his commiſſion, though he offered to concur with him, but gave him irreverent language. The defence was, He offered to prove he apprehended none but ſuch as ware guilty. This being admitted to probation, it's ſaid he hath not proven it.

No. 458,  
p. 162.

10 *Auguſti* 1680.—Alexander Home of Sclaithouſe gave in a libell to the Privy Councell againſt Lylle, reliſt of Home of Bellita, and James Home now hir huſband, craving hir children with Bellita might be delivered up to him as ther tutor in law, who ought only to have the cuſtody of them. The Lords ordained the children to be delivered up to him as tutor; albeit they ware yet but young, and the mother offered to intertain them gratis, and that it was deſired they might be permitted to ſtay with their mother, during the dependence of the reduſtion they have raiſed of his tutory, as only being neireſt cognat and not *agnatus per virilem ſexum junctus*, as the A& of Parliament in 1474 requires, all which was heer repelled, for the Biſchops thought it unfit to concredite the care and education of children to ther mother and ſtepfather, ſhee frequenting conventicles, and he refuſing to take the Declaration; otherwayes, the

children being within seven years old, and the offer to seek nothing for their intertainment, use sometyms to move the Lords of Seffion.

19 *Augusti* 1680.—Robert Mein, keeper of the letter-post office, is imprisoned by a Committee of the Privy Councill, for publishing the News Letter before it was revised by a Councillor or their Clerk, (tho he affirmed he had shewed it to the Earle of Lithgow before he divulged it.) What offended them was, that it boor that the Duke of Lauderdale's goods ware shipping for France, whither his Grace was to follow shortly ; which was a miftake. He was liberat, after a day or two, with a rebuke. No. 459,  
p. 162.

1 *Septembris* 1680.—Mr. John Dickfon, one of the preachers at field Conventicles, was apprehended and put in prifon, and the Councill inclined to fend him to the Baffe. No. 460,  
p. 162.

5, 6, and 7 *Octobris* 1680.—At Privy Councill, ther being a letter from the King to perfitt that modell out of the Militia of 5500 men, if it was agreable to law ; and the Prefident of the Seffion being put to it, tho he had voted for it before, yet, feing the bone put in his foot, he waved it, and told, the Lords of Seffion was the King's councill at law, and the wholle Judges ware not in toun, and would not be till November : and fo he got it laid afyde till then. I fuppofe, the Seffion fhould vote it legall, it being a point of government and policy, that nether will make it law, nor binding ; and it will be dangerous to bring up this praetife of referring to the Seffion, and not to a Parliament ; for this, in proces of tyme, may bring them to be adhibit in verifeing all the King's A&ts and Edicts, (as the Parliament of Paris ufes to do ;) and being of the King's nomination, and removeable by him, they will not dare refufe to ratifie and interinate them. No. 461,  
p. 163.

2<sup>do</sup>. By his Majeftie's warrant, ther was a proclamation, yet extending the gracious favor of his indemnity to all that had been at Bothuel Bridge in armes, and would yet come in and take the Bond never again to rife in armes, betuixt and the 1ft of March nixt. But it excludes minifters, heritors, prifoners, and ringleaders, *i. e.* officers, *fautores*, and upftirrers.

3<sup>to</sup>. Mr. John Waufe, keeper of the tolbuith, got a severe reproof from the Councell, for suffering one of the weemen to escape the prifon, who had affifted Mr. Donald Cargil's escape at the Queenfferrie, in June laft; with certification, he fhould not only be deprived if he fell in the like, but alfo he and his cautioners moft rigoroufly perfhued.

4<sup>to</sup>. The outed minifters and other mafters, teaching grammar within Edinburgh, ware filenced and difcharged from keeping Latin fchoolls, conforme to prior a&ts againft them, in favors of the High Grammar-fchool; and that they are difaffected perfones, and refufe the Supremacy and Declaration. See the [4th] A& of Parliament in 1662, *in fine*.

5<sup>to</sup>. Robert Curry, wryter, being bound as cautioner to prefent a man, imprifoned upon fufpition as one of the rebels, but bailed by him, at this Councell-day; and the man being very fick, and like to dy, Robert, to exoner himfelfe, did caufe bring him from his oune houfe, carried by five or fix people on a bed, and brought him to the Privy Councell doors, and took inftruments on his prefentation to free himfelfe. The Chancellor and Councell took this rude and cruell ufage of the poor fick man fo ill, that they commanded Curry to prifon, feing he might, by a bill, have represented it, and gotten himfelfe liberat.

6<sup>to</sup>. Seton of Carrifton's 2 daughters raifed a libell for aliment againft their father and his creditors. The Lords confidering they ware come to age, and that their father offered to intertaine them in his oune family, (tho they affirmed he had ufed them moft barbaroufly,) the Councell referred them to the Judge Ordinar, and recommended to them to goe home and ftay in their father's houfe.

7<sup>o</sup>. One Campbell, acceffory to the murder of one of the King's dragouns, and he who affixed the proclamation at Sanquhar, in June laft, depriving the King, was examined feverall tymes before the Councell, and abydes at the lawfulnessse of all he had done.

8. Sundrie Lithgow-shire heritors ware conveyened for abfence from the King's hoft.

9. Fergusfon, whom Duke Hamilton complained of, (*ſupra* 5<sup>t</sup> of Auguſt, p. 162,) was found, after probation, in the wrong, and fo was imprifoned.

2 *Novembris* 1680.—At Privy Councell, the Duke of Albany and York <sup>No. 462, p. 164.</sup> being present, there is a letter to the King,<sup>1</sup> subfcriyved by all the Privy Councelors present, rendering the King most humble thanks for the favor of sending his Royal brother amongs them, and beseeching to know the measures by which they are to serve his Highnesse; and that they will oune and assert the lineall succeffion of the Croun to the utmost. This is a boast to he&or the House of Commons and generality of the English nation, who would have the Duke of York declared incapable, as a Papist.

This same day, the Lords of Session, and some Advocats, in ther gounes, went down to the Abbey of Halirudhouse, and payed their compliment to the Duke, and got a kisse of his hands, on ther knees.

At Privy Councell this day, the Earle of Murraye's signator for being Secretary to his Majesty, (*de quo vide plura alibi*, page 213, in an 8<sup>vo</sup> manuscript,) in place of the Duke of Lauderdale, was red, and was approven and accepted.

11 *Novembris* 1680.—At Privy Councell, Sir John Scot of Ancrum is <sup>No. 468, p. 165.</sup> procefst, for speaking reviling and opprobrious words of the King and his Privy Councell.—Objected against Major Murray, one of the witnesses,—He could not be receaved, both becausè he was the Advocat's informer, and, 2<sup>do</sup>, he confessed he was not in the rounge with him; and so being only in the nixt rounge, and overhearing, might easly mistake words. The Lords admitted him, becausè the Advocat declared he was not his informer. But the King's Advocat knew weell enough, the Major (to evite this) had informed him who went and gave the Advocat information of it; so he was *causa causæ*, and the mediat informer.

2<sup>do</sup>, The Laird of Brody, and some other gentlemen of Murrayshire, are conveyened before the Privy Councell, for absence from the King's hoft at Bothuel Bridge, tho the Rebels were dissipat before they could come the lenth; only they had not attended the rendevous. Brodie was affoilzied, that his father was alive, and he had no right to the lands; yet

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<sup>1</sup> See this letter to the King in print.

it was knowen, he alone was in possession, and acted as heritor, and gave discharges to the tennents; but he swore for it. They thought to have griped them, because they would not take the Declaration against the Covenant; likeas, in their shire meetings, they opposed the Earle of Murray.

3<sup>th</sup>, Ther was the precognition of the affair of the two Earles of Caithnes: it was referred to a Committee. They complained of Glenurquhie, or Earle John, that he had abused to cruelty and oppression the power the Privy Councill had given him of fire and sword. He complained again of George, that, among many other barbarities, he had wilfully brunt doune the Earle's principal mansion-house.

No. 475, p.  
168.

18 *Novembris* 1680.—At Privy Councill, Greinhead, Chatto, and some other Tivedale lairds, being pershued for absence from Bothuel Bridge raid, they proponed a defence on the General the Duke of Monmouth's passe and exemption to stay from the host. The Privy Councill found, it was not within the commission and power of any Generall of ane army to dispence with men's coming to the King's host; they not being his souldiers, nor under his dispose, till they appeared once at their cullors and standart; and if he might licence the absence of one, why not of mo, and so of all? but after they are in the army, he might, upon rational excuse of sicknesse, &c., grant forloffs, &c. Yet, in regard the Duke of Monmouth was a stranger, they excused thesse Gentlemen for this tyme, but declared they would not sustain it hereafter. Ther was ground to suspect their licences were only obtained *ex post facto*.

2<sup>do</sup>, Balfarg and the Lady Bogie pershue a ryot against William Strauchan, a creditor of Weymes of Bogies, for offering to poind after a suspension and protection intimat, and that ther was a chamberlane nominat by the Lords to manage Bogie's estate for the creditors behooff.

3<sup>o</sup>, Sir William Wallace of Craigie pershues the new toune of Air for offering to choice ther oun magistrats, wheiras he alledged it was but a brugh of barrony, and he had the sole power of electing ther magistrats. They answered, they held of the Prince of Scotland, and that the late

Craigie, by his power without any right, fought to oppresse and intrall them. The Councill, after probation, found Craigie had right for what he clamed, and decerned.

4<sup>th</sup>, Ther war mutuall libells and complaints betuixt Murray of Philiphauch, Shireff of Forres-shire, and Urquhart of Meldrum, who commanded one of the King's troupes. The Shireff complained [that] Meldrum usurped jurisdiction in his Shirefdome, and excluded him from sitting with him, without any power from the Privy Councill; and threatned to imprison him. Meldrum alledged, the Shireff and the gentry refused to give up a lift of those in ther bounds who had been in the late Rebellion. Both ther libells ware admitted to probation. Tho Meldrum's power from the Councill to sit as a Justice of Peace, and not to act alone, was expired, yet the Chancelor got him of by ane agreement.—This insolence may give us a tast what military government would be: *vide infra*, page 174.

20 *Novembris* 1680.—By a command from the Lords of Session to Mr George Bannerman, shirefdepute of Perthshire, he is ordained to fend over <sup>No. 476, p. 168.</sup> tuo nottars from his bounds, to be set on the trone of Edinburgh, with a paper on ther brows, becaufe the Lords have found, that they being called to subscrivve a testament for ane old woman, they took hir hand after shee was insensible and speechlesse, and caused her touch the pen, and then subscrivved for hir as having her mandat, tho they had none, and shee understood not what they ware doing: for which the Lords declared them infamous, and to be punished in manner forsaide.

[*Primo Decembris* 1680.]—The ouners of the Elephant which was <sup>No. 490, p. 171.</sup> brought hither from England to be showen, having charged Alex<sup>r</sup> Daes, merchant, and the other fermers of it, on ther contract to pay the 400 lb sterling for the use of it severall moneths, they presented a bill of suspension on fundry breaches and contraventions of the said contract; such as, they did not shew it at the precise howers appointed, and took advantage by shewing it privately, for which they have not compted, and did not shew all it might doe, viz. its drinking, &c.; but it could not drink every tyme it was showen.

No. 495, p.  
172.

4 *Decembris* 1680.—A Privy Councell is called extraordinary, who issued out letters for charging Patrick Carnagie, brother to the present Earle of Northesk, Kinfauns, and Fineven his brother, Haliburton of Pitcur, and other ther accomplices, for to compear and answer for the plagium and rapt committed by them in the night on Mary Gray, Ballegerno's 2<sup>d</sup> daughter, a girle not yet 12 years old, law being very severe in the punishment *raptoris immaturæ virginis*. *L.* 38. § 3. *D. de pœnis, ibique notæ* Van Leuwen & Gothofredi. They having compeared, and alledged, they ware lawfully married, it was answered, It could not be a valid marriage, because shee was but xj years and a moneth old; and no religion nor church communion, nather Roman, Lutheran, nor Calvinist, permitted marriages of weemen before 12 years fully compleet. Yet it was urged, that in procacious and præcocious maids *de jure canonico malitia supplet ætatem*, and that shee was of a great growth. Patrick Carnagie's mistake and apprehension was, that the most his rapt could be called was only a clandestine marriage, which the [34th] A& of Parliament in 1661 fynes with 1000 mks for one of his quality; but they never considered it was no marriage, being *virginis impuberis et immaturæ*. Patrick being fugitive, a proclamation was emitted against him in print, and some spoke harsh things, that if he could be got he deserved hanging, for ane example to secure men's children from such attempts. (*De tempore contrahendi nuptias*, see *alibi*, in an 8<sup>vo</sup> manuscript marked R. page 5, wher ther are some curious observes from Aulus Gellius, &c. *De puella nubili* at 9 years. See Chamberlayne's present state of England, part 1. page 486. See in other manuscripts the aireffe of Craigleith's case, item anent Strathuird's daughter.)—*Vide supra*, page 68, Captain Tyrie, hir mother's husband craving the custody of this same girle at Privy Councell from the tutor. Now, on this negligence, the Lords took hir from the tutor, and ordained hir to stay with hir mother, who made hir appear with much confidence, and demand justice against hir ravisher. See more *infra*, page 178 & 180.

No. 496, p.  
173.

6 *Decembris* 1680.—At Criminall Court, Sir James Stanfeild pershues the Earle of Queensberry, Justice-Generall, for cutting some timber at



the lead-mines in a ryotous manner. The defence was, he acted by the Shireff-depute's warrand. Replied—the Earle of Nithsdale's Shireff-depute ther being a knowen Papist, he could not, by the 9<sup>th</sup> A& of Parliament in 1567, and A& 45 in 1572 *in fine*, be a judge; yet the Criminal Lords sustained the defence; but this being *mali exempli*, they persuaded Sir James, on ane agreement, to passe from his pershuit.

9 *Decembris* 1680.—At Privy Councell, in the affair above mentioned, No. 449, p. page 168, betuixt Philiphaugh and the Laird of Meldrum, the four gentle-<sup>174.</sup> men in Forres-shire, viz. Wells, &c. who were imprisoned on Meldrum's complaint, are set at liberty; but the Advocat is ordained to proces them on the 2<sup>d</sup> A& of Parl. in 1670, for refusing to depone anent ther knowledge of Conventicles, or refetting Intercommoned persons since the King's pardon and indemnity in June 1679.

2<sup>o</sup>, The two Earles of Caithnes, ther mutuall complaints being found criminal, are remitted by the Privy Councell to the Justice Court.

3<sup>o</sup>, David Suinton, late bailzie in Edinburgh pershues one Lyell, fervitor to the Vicount of Oxenford, for defaming him, and posting him up upon severall of the publick places of the city by programs as a coward. His libel was admitted to his probation. *Vide infra*, p. 178.

24 *Decembris* 1680.—At Privy Councell, Cromvel Lockhart of Lee No. 515, p. pershued one La Prune, a Frenchman servitor to the Earle of Forfar,<sup>177.</sup> for a ryot committed against him and his wife.

2<sup>o</sup>, Maitland of Pitreichy pershues Mr. William Moir, advocat, for a ryot in keeping a Shiref-court in Aberdeen, after he, as sole Shiref-depute from the King during his lifytyme, had discharged it. Mr. William's defence was, he had a deputation from the Earle of Errol, who was Shiref principall. The Lords discharged Mr. William Moir from exercising the office of Shiref-deputy their till he prævailled in a declarator of his right before the judge ordinar, the Lords of Session, to whom they remitted him.

## INCIPIT ANNUS 1681 FÆLICITER.

No. 517, p.  
178.

4 *Januarij* 1681.—At Privy Councell, Lylle, for defaming bailzie David Suinton, is ordained on his knees first to crave the Councell pardon, and then the Bailzie, and was sent to the Tolbuith during pleasure.

2<sup>o</sup>, Kinfauns, Fineven, and Pitcur, for being accessory to the violent away taking of Mary Gray, (*de quo vide supra*, page 172,) ware put to ther knees, and sent to the Castle of Edinburgh, and ordained, under all hyest pains, to produce him who wounded the fervant while he was resisting ther rapt: they came weell of, that ther acknowledgement of the fault was accepted instead of a fine.

3<sup>o</sup>, Articles of treason being exhibited at Criminal Court against Campbell Earle of Caitness, for fyre-raising, murder, treasonable garrifoning of houses, convocation of the liedges, and acting both before and beyond his commiffion and warrand from the Privy Councell. He gave in a petition to the Secret Councell, craving that the Advocat may be ordained to condescend on his informer of thesse articles of treason, to the effect the Earle might get the informer to subscribe in *pœnam talionis*, by Act of Parl. in 1587, if he succumb, because the Advocat, as *calumniator publicus*, is not liable himselfe. The Advocat answered, he was not oblidged, else this should discourage all informers if they ware divulged and so exposed. Some thought, *peffimum illud genus delatorum* ought not to be emboldened by concealing ther names, and exeeming them from the hazard of retaliation. It deserves to be considered what kind of garrifoning of houses is unlawfull or treasonable; for, if I hear that the Hylanders are coming doune to rob my house, if I take in 20 or 30 men into it, (not against the publi&, but them,) *Quæritur*, If it can be construed a garrison, unlesse I had them lifted under a captain, and under pay, and under cullors, and formally sworne theirto? which certainly ware unlawfull without the King's consent. (See the folio manuscript A. folio 230, [*supra*, page 85.] in Affint's case in December 1673.)

13 *Januarij* 1681.—At Privy Councell, Kinfauns fyned for the rapt No. 527, p. 180.  
above mentioned, page 172. Item, the proclamation anent the burning  
of Preiftfeild, the passages wheirof see in my folio Hiftorique Manuscript,  
marked G. page xj. and *sequente*.

17 & 18 *Januarij* 1681.—At the Criminall Court, one Sibilla Bell and No. 530, p. 180.  
hir mother are sentenced to be hanged for murdering and strangling a  
child borne by the said Sibilla in adultery. Item, 3 other weemen are  
condemned for the same crime committed by them on ther bastards;  
which sentences ware accordingly put to execution the 26 of Januar  
theirafter on them. As also, 2 other weemen ware then hanged for ther  
opinions and principles disowning the King and the Governement, and  
adhæring to Camron's treasonable Declaration. They called the one of  
them Isobell Alison, from Perth, and the other Harvy, brought from  
Borrouftounnefs. See my Hiftorick folio manuscript, marked G. page 13.

20 *Januarij* 1681.—At Privy Councell, a petition was given in and No. 532, p. 180.  
fubfcribed by the Lord Yester, by Salton, and ten other gentlemen of  
Eift Lothian, complaining of the standing forces, ther quartering upon  
them, by ther officers order giving them localities. This bill was ex-  
treemly refented, becaufe it called Quartering contrare to law; and  
feemed to derogate from the King's prerogative, and reflected on the  
Governement.

21 *Januarij* 1681.—The Proclamation againft the Students of the No. 533, p. 181.  
Colledge of Edinburgh was emitted. (*vide* the preceding page, anent  
burning of Preiftfeild.)

23 and 25 *Januarij* 1681.—Alexander Hamilton, merchand in Edin- No. 537, p. 181.  
burgh, was imprifoned; and Trotter of Mortonhall was sent for to be  
apprehended. The first, by the delation of Riddell of Hayning, for  
faying he beleived ther would not be fo much resentment taken if the  
picture of our Savior had been burnt, as was for bairnes their burning  
the Pope in effigie. The second on Hay of Bara's delation, (a most

ungentleman employ fure; for *odi memorem compotatorem*,) for telling he heard, that night Preiftfeild was brunt, ther ware some of the Duke of York's fervants feen walking near the garden, which was to turne over the firing it on the Papifts. When they ware examined, they mollified their words; and after some dayes imprifonment, Mr. Hamilton, on a bill mentioning his loyall principles and deteftation of all faction, and forrow if any words efaped him, was liberat on caution. Morton-hall was never incarcerat.

No. 540,  
p. 182.

28 *Januarij* 1681.—Craig of Riccarton having dyed in the fornoon, and having waird lands, and his air a minor, the waird and marriage was gifted by the Exchequer, that fame afternoon, in favors of Jo. Cunyhame of Entirkin, ther was fo much præcipation ufed by Halton, who appeared for it. Sir William Purves took the confidence to fyde in with the Dutcheffe of Lauderdale and E[arle] of Murray, fecretary, and get another gift of it paff his Majefty's hands; alledging, the 1<sup>o</sup>. was null, being above the fumme and value to which the Exchequer by their commiffion and præfife are ftinted.

No. 543,  
p. 182.

*Primo Februarij* 1681.—At Privy Councell, the A& is paff, reftoring and opening the Colledge of Edinburgh again, upon conditions that the parents find caution for their children under the penalties theirin mentioned; and that theffe ftudents above the Semi-claffe fhall take the oaths of allegiance and fupremacy, and give oblidgevements under their hands that they fhall goe regularly to their parifh churches.—Ther was few or none who gave thair conditions.

No. 572,  
p. 188.

*Eodem*, 25 *Februarij* 1681.—The Lady Traquaire *contra* the Earle of Southefk, being omitted to be infert heir, fee it marked in a 4<sup>to</sup> law manufcript marked A, 2, p. 102. *Vide infra*, thir parties, page 238, *in calce*.

No. 577,  
p. 190.

After Feb. 26, fee, in a 4<sup>to</sup> law manufcript, marked A. 2, many law obfervations and decifions which I gathered and wrot into that book, during this laft Winter Seffion of November and December 1680, and

Januar and Februar 1681, and during the Spring Vacation thereafter, because I knew not their præcise dates; therfor I did not insert them into this manuscript; they begin at page 47 of that paper book, and continue to the end theirol.

2 *Martij* 1681.—Robert Milne of Barneton, tackfman of the King's No. 578, p. 190.  
customes, pershues severall merchands of Edinburgh at Exchequer, for embezilling and stealing ther goods uncustomed. Alledged, 1<sup>o</sup>, his libell was generall, not condescending on the tyme, place, ship, and the particular specie of goods, but onlie kinds and quantities libelled at randome, on which they could not be holden to depone. 2<sup>do</sup>, When Sir John Nicolson was tackfman, and urged to have the merchands to give ther oaths, the Lords of Exchequer ware tender and refused it; and by the laws and customes of other nations, no such oaths are taken, seing they have ther waiters, and *de facto* doe searck and confiscat all when found, which remedies are sufficient to secure the King's interest, *ne quid detrimenti habeat ex fraudato vectigali*; only our 12<sup>th</sup> A& of Parliament in 1669 expressly allows the proving of it by oath for deeds 3 moneths back from the citation. 3<sup>do</sup>, Tho the custome be liquidate by the book of rates, yet he in a most arbitrary manner exacts more. 4<sup>to</sup>, Tho by the policy of all well-governed commonwealths, collectors and fermors of customes should, nather by themselves nor by palliat interposed persones, carry on a trade, yet the said Robert, to the underselling and discouraging of all merchands, dryves a trade himselfe, &c. Continued till June. *Vide infra*, page 191.

*Eodem die*.—The A& for prohibiting the importation of severall mer- No. 579, p. 191.  
chandizes this day past; but it was perfyted by the large A& regulating trade, dated the 11 of April thereafter. Upon this the tackfmen of the King's customes gave over ther tack, tho it was proven by ther books the prohibited commodities did not amount to 1500 lb. *per annum*; many of them stollen by without paying custome, such as laces, ribbons, &c. The customes ware turned unto a collection, wher Halton got Robert Milne for his man, the Chancelor, Captain James Crawford, and the D[uke] of York recommended Sir James Dick, because of the losse of his house.

No. 580, p.  
191.

*Eodem tempore.*—At Criminal Court, Hamilton of Kinkell, who was taken in Fyffe when he was going to joyne with thoffe who rose at Bothuel Bridge in June 1679, is set at liberty upon caution ; and 3 fellows called Gogar, Miller, and Sangfter, are sentenced to be hanged on the 11<sup>th</sup> of March, for thir treasonable principles against the King, in adhæring to Cargil's Declaration and Covenant. Ther was a 4<sup>t</sup>, called Murray, sentenced likewayes to die with them ; but on the 10 of March, he was prevailed on by the Lord Register, Sir Thomas Murray, to petition the Councell, which the rest would not doe ; and so he was reprieved for 8 dayes first, and then on the 18 of March for a longer tyme. See this in my Hiftoricall manuscript marked G, page 15.

11 *Martij* 1681.—Gogar, Sangfter, and Miller, are hanged at the Graffe Mercat of Edinburgh. *Vide supra, paginam præcedentem.*

No. 581, p.  
191.

4 *Martij* 1681.—Robert Milne, tackfman, &c. against Sir Patrick Home of Polwart, for customes, &c. Alledged, he exported and imported nothing but for his oune use, and whatfoever is so done by noblemen or gentlemen is exeemed from paying of custome by ane expresse law, A& 152, Parl. 1592 ; A& 251, Parl. 15, Ja. 6. in 1597, *in calce*, and the other lawes and authors their cited. Answered, 1<sup>o</sup>,—This A& does not liberat from excise, which is a tax and burden invented and imposed since thesse Acts, and the exemption is not repeited in the A&ts anent excise. 2<sup>do</sup>, The Parliament's grant of the customes to the King in 1661 has innovat this, and there is no reservation in favors of gentlemen. 3<sup>do</sup>, No other import is exeimed from Customes but what is the produ&t and immediat returne of our oune exported commodities, which this was not. Replied—It's enough that it's not reschinded nor tane away. This touches the gentry in ther copieholds and ther ancient priviledge. It was continued.

No. 582, p.  
191.

5 *Martij* [1681.]—At Privy Councell, the Marks are cryed up to 14 pence. Craig fayes, (page 110 and 115, *Feudorum*,) by hightening money, the price of all things estimat and bought by money, rises proportionally, so that it is a great inconvenience to the publick. See Bodinus

French treatise upon Malestroit's *Paradoxes*, anent the crying up or doune of money. See A&S 18, 19, 21, and 23, Parl. 3<sup>d</sup> and 4<sup>t</sup> James 3<sup>d</sup>, in 1467.

*Eodem die.*—The Privy Councill heard the debate betuixt the toune and shire of Aberdein anent ther malt merkat. The gentlemen of the shire and ther tennents alledged they ware in possession thesse many years of bringing and selling ther malt within the toune of Aberdeen without the leift interruption. The toune contended they suffered no other malt to be fold in the merkat save what was grinded at ther oun milnes. The shire would not yeeld to this, being upon the matter a waft servitude of thirleage. The Councill named a Committy for confidering this, and to prepare a report againt the nixt day. I hear the shire had clearly proven ther 40 years possession of the priviledge of the use of the merkat with the burden of the belman's exa&ing as much malt as his bell would hold out of every sack, which at laft was converted to a groat of money for every boll.

8 *Martij*.—This being advifed by the Councill, they decided in favors of the shire, and ordained the toune to pay the shire's commissiioners 1000 merks for ther expences.

8 *Martii* [1681.].—The Privy Councill refused a warrand or licence to George Seton of Barnes to import horses or cows from Ireland, whither he was going; tho in his bill he offered caution and bond to sell none of them, and thereby wrong the native product; but he was only to use them for his own labouring, and stocking the ground; and they would not dispensis with ther oun A& of Councill.

10 *Martij* 1681.—Nisbet of Craigintinny pershueing his mother at P. Councill for ane aliment, as the air, of hir exorbitant joynture of 3600 mks. free per annum, upon the 25 A&t of Parl. James 4<sup>t</sup>, 1491, he, tho air, not having a competency *aliunde* wheiron to live, and being left with great debt, so that the burdens ware not of his contracting, or by his luxury, and shee had married again, and did not apply any part of hir exceffive joynture and lifrent to the children of the first marriage, his

brether and fifters, by whoffe father thee had it, and what the Councel had tane away from the Countes of Murray was instanced. Tho the committee (to whom it was referred) ware very favorable in ther report, and gave ther opinion thee should be restricteed to the halfe, yet the P. Councell refused to take any thing from hir, and resolved for the future to medle sparingly in such matters, seing no man could be secure, when by solemne stipulations and agreements, such as matrimoniall contracts are, he had provided his daughter to a joynture, and given a great tocher in contemplation theirof, if such arbitrary encroachements ware allowed, and fand the favor shewed to the E[arle] of Murray ane extraordinary case, and not to be drawn in exemple. However, they referred him to the judge ordinar, and he hath raised a summons before the Lords of Session, whair it will be difficult to reach hir in law. *Vide infra* of this, page 144; *item*, p. 322, Bruce.

No. 586, p.  
192.

*Eodem die*.—One Major Lyell complaining to the Councell that his horse was arreifted for debt by a burgesse, tho he was an officer of the militia, the King's Advocat freely alledged they had no priviledge, else all the 22,000 men (wheirof our militia consisted) might plead the same exemption, and so the execution of law should be blunted, and they become our masters instead of being our servants. The D]uke] of Albany refented this, and said tho the common sojors may not clame this priviledge, yet the officers nominat by the King ware certainly fred from all summar arreiftments, ather of ther persons or horses and armes, in all the places wheir ever he had been in, else upon reall or forged grounds the King's service might be retarded or disappointed by his ennemies; but the custome was for creditors to apply to the General or Admiral, and he was to call the debtor before him, and give him 3 moneths to pay it in, and if he did not pay it within that space, then he was to turne him of, and leive him to the course of law.

No. 587,  
p. 192.

15 *Martij* 1681.—Strowan Robertstone is imprifoned by the Councell for jussling with the Marquis of Athol, and giving him and his servants injurious and opprobrious words. *Vide supra* thir parties, page 189.



17 & 18 *Martij* 1681.—At Criminal Court, the Heritors of Cliddisdale <sup>No. 588, p. 192.</sup> who ware in the rebellion of Bothuelbridge in 1679, being upon the pannell, it was alledged for Gawin Hamilton of Hill, sone to Raploch, absent, that he could not be declared fugitive, (what needs they both be declared fugitive, and a sentence of forfaitor likewayes be pronounced against them, might not the last serve for both,) because, having been in prison, the Privy Councell had set him at liberty, to appear at a day not yet come. The Justiciars fand, notwithstanding of that bond, he ought to have appeared before them in this Court. 2<sup>do</sup>, Alledged, he was illegally summoned at his dwelling-house of Hill, wheiras 40 dayes, yea a year before that, his wife and family dwelt at Strathaven. Answered, by the King's Advocat, that no defence could be proponed for ane absent traitor. (See the Advocat's Criminals, page 58.) Likeas, the 40 dayes were introduced in favors of pershuars, that if a man had staid 40 dayes in a place, tho it was not his residence and domicil, yet the pershuar might convene him ther, it founding *competentiam fori* against him, but not *vice versa* that a citation should be unlawfull, if he ware 40 dayes absent from his oun house. The Criminal Lords fand no defence could be proponed for a traitor unlesse he ware present.<sup>1</sup> Some thought this hard, seing tho we cannot defend *in causa*, yet I may propone *probabilem rationem et causam absentiae* ane essoinzie of sicknesse, or say that he is absent *rei publicae causa*, or not at all cited. Now, to be cited illegally at the wrong place, and to be not cited at all, are æquipollent. *Quæritur*, If a creditor of the rebells whose debt is unconfirmed may compear for ane absent traitor, and produce his interest, *videns rem suam agi*, so that he may lose his money, and if he will be admitted to object against the relevancy and probation. Though it be very æquitable, yet it was thought it would not be permitted, his being only a civill interest. For others, viz. Muirhead of Braidisholme, &c., it was alledged by Sir G. Lockhart, that its true *Advocatus fisci non præsumitur calumniare*, yet gentlemen's lives, estates, and reputations ought not to be brought in question without he con-

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<sup>1</sup> Somervell of Urats was clenged by the assise. *Vide infra*, the assise pershued for it, page 202.

deschend on his informer, that he might subscribe *in pœnam talionis*, both conforme to the civil law and to the laws and practise of all nations, and the 49 A& of our Parl. held in 1587; for the very pershueing leives a stigma, though they be affoizied. *L. 3. C. de generali abolitione.* The Advocat declared he had no informer; but the Privy Councill and Exchequer having employed one to take up lists of all suspect persones, he, by the Councill's warrand, now pershued them. The Justices fand the Councill's warrand sufficient to liberat the Advocat from condeschending upon any other informer, tho this may evacuat the force of the said just A& of Parl. *Vide supra*, page 165, Scot of Ancrum, and page 178, Earle of Caithnesse.

Then the Advocat offering to continue the dyet against the rest of the heritors, it was alledged, the dyet was peremptor, and behooved ather to be deserted, or else they immediatly tryed and put to the knowledge of ane affise. The Lords fand the Advocat ought to insist against such whose witnesses in the list ware all present, but as to these who ware not in that case, continued them to June nixt, he peremptorily bringing in all his witnesses and insisting then, otherwayes the dyet should be deserted. At this tyme, the Criminal Lords got a præcognition what the witnesses could say with cloffe doors; tho not upon oath, yet caused them subscribe ther declarations, that *quoad* such as they found no probation against they might desert the dyet, which abridged ther labor, ther being upwards of 70 or 80 on the pannell; but it was clearly *proditio testimonij*, and a dangerous novelty, engadging the witnesses to hyde at what they say behind the pannell's back, and very irregular in the Criminal Court, wher, by 91 Act of Parl. in 1587, no probation can be tane but in presence of the pannells and affise; and the use of these precognitions have been only assumed by the Privy Councill. Tho some of them who ware continued or deserted (seeing new letters might heirafter be raised against them) desired ther witnesses in defence and exculpation might be receaved to ly *in retentis ad probationem innocentie*, lest they should dy *medio tempore*. This was refused them, seeing the King ran the same risk with his; yet they had præcognosced; but that declaration (if the witness dyed) would not prove.

*Eodem* 18 Martij 1681.—The Privy Councill revoked the protection they had given to Samuel Macreith, in so far as he could make use of it against the Earle of Winton's debt, the Earle alwayes giving him 24 howers advertiffement that in the mean tyme he might shift for himselfe. No. 589,  
p. 194.

8 Aprilis 1681.—Mr. Alexander Burton gave in a complaint to the Secret Councill against John Burton, his brother, for putting him in Hopkirk the chirurgian's hand, as if he had been a madman, which was against the subject's liberty. Alledged, He was hypocondriack, and a melancholy idiot, and sometymes furious, and therfor they had also a bill in to the Lords, desiring they would cause secure him, and appoint some to be curators to manage and administrat his fortune, because he misemployed and dilapidated it. He answered, They had his portion in their hands, and he was only craving his annuelrents; and to refuse him his oune, and thrust him in *ergastulo*, and treat him as a fooll, would raise peper and passion in any man's nose, and then they termed these acts furie; for *ira est brevis furor*. In Scotland, we having no bedlam, we commit the better sort of mad people to the care and taming of chirurgians, and the inferior to the scourge, the poor. The D[uke] of Albany desired he might be permitted to speak, wheir he extravagated, so that they inclined to affoilzie John his brother, and find that he deserved to be put in a correction house. No. 590,  
p. 194.

*Eodem die* [4 Maij 1681.]—The Councill having considered Mr. Burton's affair, (*de quo supra* this same page,) they fand he was melancholy and hypocondriack, and therfor committed him to the custody of his brother, (he is to get the gift of the tutorie from the Exchequer,) which was judged hard, he being his air and *alioqui successurus*; and *tutores furiosis dati*, like other tutors, if they be nearest, should not be trusted with the keeping of their person. Yet see the A& of Parl. 1585, and the Laws of the 12 Tables their cited. *Vide supra* more of thir parties, page 204. No. 594,  
p. 194.

13 Aprilis 1681.—A poor woman was this day hanged at the Graffe Mercat of Edinburgh, *pro infanticidio in proprium suum factum commissio*. They say shee declared, one of the main temptations shee had to mur- No. 591,  
p. 194.

der her child, was to shun the ignominy of the Church pillory ; which the Duke of York hearing of, and informing himselfe of our custome, and that it was used in no other place of the Christian world, and that it rather made scandals than buried them, and increased whoredome rather than brought the committers of it to any penitent sence of their sin, and that it was not used for drunkennes, swearing, Sabbath-breaking, lying, and other enormities ; the Duke was displeased, and thought it would be a more efficacious restraint, if the Civill magistrate should punish them, ather by a pecuniarie mulct, or a corporall punishment.—See ane essay *alibi* in another manuscript, marked , page , for justifieing this custome, from that text, “ They who sin openly should be rebuked openly,” and from the penances imposed in the primitive church : see Mr. Cave’s primitive Christianity, part 3<sup>d</sup>, chapt. 5, page 352.<sup>1</sup>

No. 592,  
p. 194.

4 *Maij* 1681.—James Justice, late bailzie of Edinburgh, was pershued before the Privy Councell to pay a fyne, because ther was a Conventicle kept upon his lands of East Creighton, and he did not reveill and signify it, within 3 dayes after, to the Shireff, as the A& of Secret Councell requires. He alledged, he was not dwelling on the place, and it was long ere it came to his oun knowledge. This was repelled. Then he denyed the ground, on which it was kept, to be his. They decerned him, ather to pay the 4 part of his valued rent, or else give a renuntiation of the land he disclamed over to his Majesty.

No. 593,  
p. 194.

*Eodem die*.—James Park, keeper of the tolbuith of the Cannogate, and Gordon, his servant, are imprisoned, because they suffered one Weir, who was ther prisoner, on his being in the Rebellion at Bothuel Bridge, to escape. Tho he offered to take the bond, yet he was detained, as having been a ringleader, who are excepted from the King’s A& of Pardon and Indemnity.

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<sup>1</sup> We may say of our pillory, what Tertullian (cap. 10, *De Spectaculis*,) sayes of the weemen preists of Flora, “ *Tanquam publicæ libidinis victimæ et hostiæ in Scenam proferuntur.*” See *Camerarij Meditat. Historic. Centur. 2. cap. 41.*

*Eodem die.*— . . . . . merchand in Glasgou, on the late A&t of Trade prohibiting forrain cloaths and stuffs, petitioned the Councell for liberty to set up a manufactory for making the *farge de mines*. No. 595, p. 195.

*Eodem die.*—The Privy Councell deprived Patrick Broun of Colston from being Shiref-depute of Eift Lothian, and fined him in 50 lb. sterling, because he had exerced and acted this 8 or 9 year in that capacity without ever taking the Declaration, though the 5<sup>t</sup> A&t of Parl. in 1662, and the other A&t in 1663, forbids any to enter to any office til first they signe the Declaration, and declares them usurpers if they do otherwayes, and censureable. His excuses ware, that his loyalty and affection to the Governement, both in Church and State, ware nottorly knowen, and that he had tane it on Moonday last, and now gave it in at the Bar subscribed by him; and he had never tane the Covenant, which the said Declaration renounced, and he had never refused to take the Declaration, but it was never miniftered to him by any. All which was repelled, and they recommended to the Duke of Lauderdale, Shiref principall, to fill the vacancy.—(When Alexander Gartshore and James Grahame had acted a while as bailzies of Edinburgh, and then declined to take the Declaration, all that was inflicted on them was only deposition without any fyne.)—See him reponed, page 198, num. 4, 2<sup>d</sup> June 1681. See the following case.

4 & 5 *Maij* 1681.—The King's Advocate and [Robert] Norie, minifter at Dumfermeling, exhibited a complaint at Secret Councell against Sir Charles Haulkhead of Pitfirren, [Sir Henry] Wardlaw of Pitreivie, and Master John Dempster of Pitlever, that they, being Justices of the Peace, had acted in that office without taking the Declaration. 2<sup>do</sup>, That they sent to the said minifter to come and give them in all the fynes he had exacted of the fornicators in his kirk-sesson; and because he did not attend, they ishued out a warrand to their officer, in a court keipit by them in the afternoon, and not in the hower of cause, to apprehend him, and bring him before them; which the Bischops thought ane affront done to them, first, in calling for the fynes, and nixt, in meddling with the person of a minifter. Their defence was to the first, They had tane the Declaration in other capacities and places, once or twice, No. 596, p. 195.

and none would doubt them ; and in this Court, as Justices of the Peace, they had taken [it] that day ; which they humbly conceived to be sufficient. As to the 2<sup>d</sup>, what they did was warrantable ; for the instructions given to the justices of peace, A& 38, Parl. 1661, page 73 ; see this also in A& 22, Parlia<sup>t</sup> 1672 ; they had power to call in all the fynes for violation and transgression of pœnal statutes, such as drunkenness, Sabbath-breaking, &c., and the fornicators be not mentioned (fornicators are mentioned in the forsaide, page 73,) yet it is included in the general, being a pœnal statute, A& 13, Parl. 1567 ; that they applied these fynes for publick and pious uses ; for repairing the hy-wayes, mending bridges, &c. ; and the minister had no right to retain them, nather could he impose them without a magistrat, he having no civil jurisdiction, and the kirk-session being no court or judicatory, approven by any standing law, but meerly precarious, since the A&s from 1640 to 1660 ware all rescinded, (yet see the 16 A& Parlia<sup>t</sup>. 1661,) and what they had done was customary ; and, *esto*, they had exceeded, *error communis facit jus pro præterito*.

Notwithstanding of all this, they having private enemies in the Council, they ware deprived, and fyned each of them in 25 lb. sterling. And because Pitlever was likewise Bailzie of the regality of Dumfermeling, and had not timeously tane the Declaration, (tho all ther principles ware known to be unexceptionable,) they turned him out of that also, and fyned him in 50 lb. sterling, over and above the 25 lb. ; and fand no inferior court ought to be holden but in the hower of cause, which is betuixt 10 and 12, at leift they ought once to sit doune within that space, and then they may adjourne and continue themselves to after dinner. If they examine all the offices of Scotland, they may overtake many, and bring in a great summe. But some wondered at the policy, why snares should be laid by such tests for men repute loyall, which was to irritate them ;—and what shall we doe to enemies, if friends be thus used ?

*Iisdem diebus*, 4 & 5 Maij 1681.—Rankeilor gave in a bill to the Council, bearing that Sir James M<sup>c</sup>Gill his sone having been so unfortunat as to kil Balfour of Denmiln, and his Majesty having granted him a remission, to which the Exchequer added this quality, that he should never

be sein in Fyfe to prevent bloodshed ; and that the petitioner being now a dying, and earnestly wishing to speak with and see his sone, therefor begged they would relax so much of the punishment as to allow his sone to come and see him. The Councell doubted if they might doe this ; but the Duke of Albany affirming, that he beleived the King would not refuse this desire of any old dieing gentleman, they granted it in thir termes, that he should goe with a guard like a prifoner, and stay but 24 howers, and then depart out of Fyfe, wher the freinds of him that was killed live.

2 *Junij* 1681.—The Lords make ane A& of Sederunt anent the clerks No. 598. minuts, that they be written during the debate, and anent the dispatch of <sup>p. 197.</sup> reports. See it in my collection of the A&ts of Sederunt.

2 *Junij, post meridiem.*—At Privy Councell, their is a complaint made No. 599, by my Lord Hatton, trefurer-depute, against some of the wrights and <sup>p. 197.</sup> mafons of the Cannongate for a ryot, on this occasion :—He was building a lodging for himselfe in the Canongate, and having employed some country mafons, unfree-men, at his work, while he is at London, the mafons of the Cannogate come violently upon them, and takes away ther tools. This was represented as a dounright breach and violation of the 111 A& of the Parl. 7, Ja. 5<sup>t</sup>, in 1540, ratified by the 4<sup>t</sup> A& *anno* 1607 ; which A&ts permit the liedges to employ craftsmen, freemen or others, for bigging, or doing ther work. Alledged, the trades of the Cannogate have been in the immemoriall use and possession of hindring and debarring unfree-men from working within ther liberties ; yea, in the case of Samuel Cheisley's dead-chift, they would not suffer a wright of the toune of Edinburgh to work within the bounds of the Cannogate. It was thought the trades of Edinburgh, by ther erections unto corporations, and ther sealls of caufes, ware stated in the priviledge of hindering any unfreemen from working any part of ther calling within the bounds of the brugh royall, but ther suburbs (which are no part of the royalty) could not clame this priviledge ; and that the unfreemen in Borland's houses at the Westport, called the King's stables, ware affoilzied, and found not liable to the trades of Edinburgh, becaufe thesse stables ware no part therof ; yet now

the toune hes got a right theirto. I remember, in 1671, the Privy Councell fyned David Pringle, chirurgion, for employing one Wood, ane unfreeman barber, to exerce his calling in polling the children's heads in Heriot's Hospitall; and lately the skinners and glovers did poind some of the merchands gloves, becaufe, tho they ware freemen, yet they ware not free of the calling to fell gloves. Tho the merchands reclaimed, yet the forsaide A& James 5<sup>t</sup> seemes even to extend to brughs royall, which some expounded thus: If a freeman refuse to end my work, or desert it, then I may imploy ane unfreeman; but the A& will not bear this, for it hes a posterior clause for that. The King's Advocat acknowledged, that both brughs royal of baronies and regalities might hinder me from bringing in ane unfreeman, with whosfe work I should keep a shop and sell out what he made to others, such as a futor, &c. And this hes been a long controverfie betuen the toune of Edinburgh and the members of the Colledge of Justice, if they might keip a taylor, unfreeman, to make cloaths to himselfe and family; but the Advocat alledged, every man might lawfully employ any tradfman (tho not free in that brugh or place) to work any work to himselfe, which he was not to sell or make any profit of as ane artificer. And so the Privy Councell fand the libell relevant against them, tho many thought the bygane custome wheirby they have been in use to debar such unfreemen was sufficient in law to excuse them from a ryot, and only reprove them, and discharge the like in tyme coming. But the Councell will try from the witnessses and probation if ther was any violence used at the interruption, or if they had any warrand of concurse from the magistrat; (tho the trades of Edinburgh seik only one general concurse to serve for all the year;) for if they find they had a warrand, and used only a civil interruption to preserve ther pretended right, it is hardly imaginable how it can be made a ryot.<sup>1</sup>

2<sup>do</sup>, The privat scoolmasters in Edinburgh being called before the Privy

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<sup>1</sup> Why shall I be tyed to use freemen, if others be more dextrous and expert then they, and will work cheaper; to debar such ware a manifest prejudice to the people; tho, on the other hand, the freemen retort this argument, that they are answerable for the goodnesse of the work, wheiras unfreemen escape unpunished after they have cheated the leidges. Likeas, they payed not such prentis fees, neither doe they bear burden as the freemen doe.



Councell, and complained on by the Mr. of the High Grammar Scooll, (one school is far from being able to serve Edinburgh now); ther are Mr. Strang, Mr. William Greinlaw, and 2 or 3 others of them imprifoned till they find caution not to teach Latin till they be licenced by the Bifchop: for severalls of them ware outed minifters, and others who ware fufpected to poifon the young ones with difloyall principles; fo that the Regents of the Colledges defended themfelves, that many of ther youth ware infected and leavened ere they came to them; and even when they are licenced, not to teach the grammar, but only the rudiments and vocables; for then the children may be come to that ftrenth as to go to the Hy Schooll.

3<sup>th</sup>, A letter was red from the King, declaring the Duke of Lauderdale governor of Edinburgh Caſtle, and Lundie his deputy, and the garrifon independent on the Lieutenant-Generall of the forces, and only accountable to, and to receive orders from, his Majeſty. And a motion being made, that General Dalziel was poſtponed both in the rolls, and his place of fitting in Councell, being put after the inferior Officers of State by the laſt commiſſion, the Councell placed his Excellence nixt to the nobility, and before all the gentlemen upon the Councell.

4<sup>th</sup>, The Lords repone Colſton to his place again. *Vide ſupra*, page 195.

5<sup>th</sup>, Ther is a libell given in by Skeen of Halyeards, in Lothian, againſt Alexander Milne, proveſt of Lithgow, for oppreſſion and concuſſion, in abuſing his office by threatning and hectoring him. Alexander had alſo a reconvention againſt him, that being his Majeſty's lieutenant and deputy in that toun, yet Halyeards, without any provocation, had given him moſt opprobrious and unworthy reviling langage, as villain, knave, rafcall, &c. Both ther libells ware admitted to probation; but throw the interceſſion of freinds, they ware agried.

*Eodem, primo Junij* 1681.—One George Fullarton, a merchand in No. 605, Edinburgh, having bribed ſome of the King's ſub-customers and waiters, p. 200. and under night ſtealing in ſome packs of Engliſh cloaths at the Weſt port, and they being now abſolutely prohibite by the late a& of trade

made in April laft, and being discovered by one Lindfey, a merchand, and feized on and laid in unto a houfe till the nixt day, Fullarton, the ouner, came with 10 or 12 hyred workmen, and violently broke up the houfe wher they lay, and carried them away. This being complained on to the Privy Councell, they ordained the 2 waiters to be fcourged throw the toune, and Fullarton having fled, was declared fugitive, and fearch was ordained to be made for thoffe who affifted him; and the cloaths (fo much as ware not refcued) ware (conform to the appointment of the faid a& of trade,) brunt by the hand of the hangman, at 12 o'clock, at the croffe; [*interlined*] (but it was only the worft bales, but the fyne cloath was privily preferved,) which many thought might as charitably have been employed for cloaths to poor people; however, this, as it was the firft exemplary a& of that kind of forfaitor and punifhment borrowed by us from England, fo it was the firft exercife of Couburne, the new hangman's employment, he being installed on John Whyte's deceafe. See A& 89 of the Parl<sup>t</sup>. 1587.

No. 628,  
p. 206, § 2.

6 *Julij* 1681.—English cloath brunt at the croffe. *Vide fupra* page 200, Fullarton [No. 605.]

No. 607,  
p. 200.

*Decimo Junij* 1681.—John Spreul being pannelled at the Criminal Court for treason, and that dyet being deferted againft him, and a new fummonds of treason given him in the very Court, at the bar, by a herauld in his coat, with found of trumpet, for being with the rebels at Bothuell Bridge, (tho he produced testificats that he was in Ireland all that tyme,) and for being prefent at Cargil's excommunicating of the King, (but naked prefence heir was not treasonable, without fome farder concurfe and acceffion;) and it being alledged for him, that being put to the torture, and having perfevered therein, without confeffion of the crymes laid to his charge, the fame purged all the præceeding *indicia et præfumptiones* that urged him, fo that he can never be quæftioned on theffe again, except new præfumptions fhould emerge againft him; as was found in the Criminall Court in 1632, in the cafe of Tofcheoch of Monyvaird, accused for burning the Tower of Frendraught. It was answered by the Advocat, that ther ware farder præfumptions, *quæ eum gravabant*, which are *noviter*

*venientes ad noticiam.* 2<sup>do</sup>, His denyall in the torture could never purge, because thesse who examined him in the torture had no power nor commiffion from the Privy Councell to ask thesse quæstions at him, and he was not bound to have answered beyond ther warrands; (and yet it would have been thought presumption enough in him to have fought to limit them to ther commiffion.) The Criminall Lords repelled the defence, and fand the torture purged not the præceeding *indicia*.

2. Whereon, upon the 13 of June, the said John Spreul was tryed at the Criminall Court, and probation led against him; who deponed they saw one called John Spreul with the rebells at Bothwel Bridge, but they knew not if the pannell was he; and ther being another of that same name present in the Court, (who confessed his being at Bothwel Bridge, and had taken the benefit of the Indemnity,) to whom all the tokens and descriptions they gave agreed more then to the pannell; as the cullor of his horse, his having a cap and not a hat, with a black perriwig, &c. The affise upon this clenged and assoilzied him; notwithstanding wheirof the King's Advocat procured ane order from the Privy Counsell to detain him still in prifon till he got a new indytement, which was the 3d, viz. for treasonable expreffions uttered by him before the Counsell, such as refusing to call Bothwel Bridge a rebellion, or the assaffinating and killing the Archbishop a murder; which last is no treason, tho it be a very perverse opinion.

3. On the 14 of June, the King's Advocat having complained to the King's Counsell, that the witnesses led against Spruell had prevaricated and deponed falsely, at leift did conceal ther knowledge; it was moved by my Lord Haddo, and approven of by the King's Advocat, that witnesses, in such a case, might be tortured, when they vary, as weell as parties. This is, indeed, agreeable to the Roman law, but does not sute the genius of our nation, which looks upon the torture of *the boots* as a barbarous remedy; and yet of late it hath been frequently used amongs us. I think, however, thesse witnesses deserve to be punished; yet the affisers should not look upon the testimonies of such witnesses as a full probation, it not being spontaneous or voluntary, wheir ather they are threatned with *the boots*, or tortured.

4. After all this, on the 14 of July 1681, Spreul is brought before the Privy Councill, and fyned in 9000 merks, for refusing to depone anent his prefence at Conventicles, the same being referred to his oath, conforme to the 2d A& of the Parl. in 1670; and he was ordained to be sent to the Basse till he payed it.

No. 613, p.  
202.

16 June 1681.—At Privy Councill, a præcognition was taken for preparing a dittay, by ane Affise of Error, against James Baird younger of Saughtonhall, Mr. Androw Temple of Revilrig, Dundas of Jerviston, James Bailzie, Thomas Noble, and Robert Sandilands, merchands, Robert Elliot, Hugh Johnston, John Binny, Alexander Blair, and others; the affisers, who had on the 18 of March last clenged Somervell of Urats, and fundry other heritors, who ware pannelled for being at Bothuel Bridge, tho ther was clear probation against them. The 15 affisers were called in, one by one, before the Councill, and interrogat to declare (but not upon oath, which is a new method,) whither they voted *fyles* and *condemnes*, or *clenges* and *affoilzies*; (for it was not marked in the verdi& how every particular man voted, as should have been done, by the regulations of the Justice Court, and ratified by the 16 A& of the Parl. held in 1672.) Some 4 of them had found Urats, &c. guilty, which they declared, and so ware freed. Others craved pardon for ther clenging him, and came in the King's will and mercy. Some said, they did not remember how they voted. Others more stoutly adhæred to ther verdi& *absolvitor*, and that, in so doing, they had served both ther light and conscience. The Councill remitted them to the Criminal Court, to be pannelled their, on the 63 A& of the Parliament held in 1475, *tanquam temere jurantes super affisam* and to be judged by ane great affise of 25 noble perfons, *id est*, gentlemen at leift.—The libell uses to be in Latin, and under the Quarter Seall.

This was a strange tryall, contrare to the nature of all other præcognitions tane at Privy Councill, wher they ware ever designed in the pannells favors for mitigation, and never to his prejudice, as here. Ther was never any of thesse Affises of Error, that ever took effect in Scotland before this. But see one learnedly debate in December 1635, (it's page

315, of my Criminall Collection, and takes up 8 leiffs and a halfe ther,) against the affisers who clenged James Gordon for wilfull refetting and intercommuning with Alexander Leith and Nathaniel Gordon, open rebels; which being so full, I neid repeat nothing on this occasion heir. On the 25<sup>th</sup> of Jully 1681, the libell against them was sustained as relevant, by the Criminall Judges, and, after much difficulty, was found proven by the Affize of 25, (tho they had packed them, making the major part of them to be Officers of the Forces, and other dependers,) against 7 of them, (the rest having come in the Kings will,) who, *ad terrorem* of others, ware imprisoned, fyned, and declared infamous, on the said old A& of K. James the 3<sup>d</sup>, in 1475; tho, generally, this sentence did not beget them any reproach.

[21 Junij 1681,] *post meridiem*.—At Privy Counsell, upon a motion No. 616, p. 203. from the Duke of Albany and Y[ork], the Magistrats of Edinburgh ware called in, and it was recommended to them to call the merchands before them, and discharge them to extortion the liedges, by taking great and exorbitant prices for the merchandices now prohibited to be heirafter imported by the late proclamation, on the pretence, that ther ware no more of that kind to be imported within the kingdome.

2<sup>do</sup>. Ther is a petition given in by the King's tradsmen, such as the King's taylor, mason, wright, smith, &c., craving to be free of all watching, wairding, taxes, and burdens within the Toun, which they not only founded on ther gifts from the King, but also on the 153 A& of the Parliament 1592, and the 275 A& in 1597, allowing his Majesty to exeime one of every trade from these things. But this was when his Majesty was personally amongst us, and since it hath run into defuetude.

3<sup>do</sup>. One Erskin pershues one Robert Scot, before the Councell, for defaming, calumniating, and scandalizing him, by saying he had broke up his chop, and stollen gold money and wair out of it. The defence was, that he wanted not præsumptions to move suspition and jealousy that he was accessory, for he offered a guiny not to stage him before the Bailzies of Edinburgh, &c.; *et quælibet probabilis causa excusat a calumnia et con-*

*nitio*. The Lords admitted both the libell and defence to probation, and after advysing, they fand the libell proven, and fyned the said Robert Scot in 100 mks for his calumny.

4<sup>to</sup>. The Lord Rollo pershues Craigie of Dumbarny for manifold acts of oppreffion of the poor country peeples in Perthshire round about him, not only for injuries done to himselfe and his tennents, but also, (as if it had been *actio popularis*,) for injustices done by him to many others. The Lords having advysed the probation, they fyned him in 5000 mks, and ordained him to goe to prifon till he payed it; as also, decerned him to ly ther till he payed the dammages of all that should complain and prove themfelves to have been greeved by him.

5<sup>to</sup>. John Burton complains of Mr. James Cunyghame, wryter, that he seduces his brother, Mr. Alexander Burton, whom the Counsell fand hypochondriack, (see this *supra*, page 194,) and ordained John to have the custody of him, and yet Mr. James abstracts his person, and holds him up, and heightens him in his melancholy humours. The Councell referred the tryall of this to the Bishop of Edinburgh and my Lord Abotshall.

No. 622, p.  
205.

23 Junij 1681, *Post meridiem*.—The Toun of Kirkcaldy, in Orkney, was fined by the Privy Counsell, on a complaint given in by Captain Andrew Dick, for refusing to accept prifoners sent by him as the King's Stewart of Orkney, and combyning among themfelves not to buy from him any malt or bear, wheirby the King's rent ther happened to be the worfe payed: yet men are free to buy where they please.

*Item*.—Four of the men called the "Sweet Singers," viz. Gibb, Young, Jamison, and Kerr, who had framed a most ridiculous paper, that was printed, (of whom see my Historick Manuscript, marked [G.,] page [14];) turning more sober, retracted part of their former extravagancies, and, before the Secret Councell, declared they thought it not lawfull to rise in armes against the Magistrat's authority, tho in ther printed testimony, the Spirit did then suggest the contrare to them. Some of thir weemen Singers ware so rude, as to throw out broken chandlers, and other trash, at the Duke of York's coach, as it passed by the Canogate prifon; for which they ware severly lashed.

30 *Junij* 1681.—At Privy Councill, Edmifton of Duntraith is fyned <sup>No. 624, p. 205.</sup> in 9000 mks, and to ly in prifon till he pay it, and that for refufing to depone: 1<sup>o</sup> Anent his converfing and intercommoning with one Mr. Fofter, a minifter, denounced fugitive for conventicles: 2<sup>do</sup> Anent his having been at field-conventicles: 3<sup>tho</sup> Anent his unduetifull reviling of the Privy Councill, calling ther proceedings arbitrary and tryannical. On all which points he was urged to depone, both from the 2<sup>d</sup> A& of Parl. in 1670, and from the King's Letter in 1674, reftri&ing the punifhment, in caife they confefed, to ane arbitrary mul&. Tho Sir George Lockhart alledged, the A& of Parliament might indeed compell Duntraith to depone againft others, but not againft himfelfe; and that he behooved firft to have a remiffion paff the fealls; and the King's Letter was not æquivalent theirt. All which was repelled, and he holden as confest for not deponing, and fyned. *Vide infra*, pag. 272, Lady Cavers.

[7 *Julij*] 1681.—At Privy Councill, the former day, a complaint <sup>No. 631, p. 206.</sup> having been given in by Lanton, and fome other gentlemen of the fhire of the Merfe, that the Earle of Home, Shireff, intended to furprize them in ele&ing ther Commiffioners to the Parliament, in giving them only one day's advertifement; the Lords then did præfix the 13 of July for ele&ing.—The Counfell this day, on a Bill given in by the Earle as Shireff, fand by the A&s of Parliament, the Councill ware not the parties who could fet dayes for the Heritors conveening and choifing ther Commiffioners to Parliament, but only the Shireff. Yet they ordained him to give a competent fpace of advertifhment, at leift 6 dayes, that they might have tyme and leifure to conveen, and that his intimation be made at the head brugh of the fhire, by proclamation over the mercat croffe, and by touck of drum throw the tounne, that it may come to all ther knowledge.

*Item*.—Mr. Archbald Hope of Rankeillor, Advocat, (becaufe he had voted againft the Duke and the Court fa&ion, in the ele&ion of the Commiffioners for Fyffe,) is perfhued before the Privy Counfell, for abfence from the King's hoift at Bothuel-bridge: againft which he proponed on his privilege as ane Advocat, (of which exemption, *vide fupra*, in

March 1680, page 142,) and that he sent a man and a horse for him. The Privy Counsell repelled this: So that out of pique, the Advocates' priviledges ware at this tyme subverted and overthrowen; but they remitted to a Committee, to confider how far his sending a horseman should alleviat.

No. 634, p.  
207.

11 *Julij* 1681.—Two weavers of Kinneuchar, in Fyffe, one called Pittillo, and the other Philp, were condemned at the Criminal Court, for denying the King's authority, and calling him a tyrant, and thinking it lawfull to kill him. They ware hanged for it at the Graffe mercat, on the 13 of July.

No. 639, p.  
208.

15 *Julij* 1681.—The Privy Councell having named a Committee, to order and adjust the differences in riding the enshueing Parliament, the Lord Sinclar put in his clame for præcedency before many old Lords, (and particularly my Lord Semple, who by the decreet of ranking *apud me* in 1606, is placed before him.) He was opposed, as only being defchended of the last Lord's daughter, and tho the patent boor *hæredibus* in generall, yet that, in the old feudall construccion, signified only airs male, and so he could not clame ther place, but only came in as a Lord of a new creation. Some advised him to forbear ryding at this tyme: however, the Councell declared they would continue him in his possession, till in a declarator he ware postponed to thesse other competitors, and accordingly, he took præcedency in the Parliament, and voted before them;—but as Sinclar rode up first, so Semple rode down the way first; and Sinclar was more at this tyme a follower of York's then Semple was.

2. It was controverted betuixt George Sinclar Earle of Caitnefs, and John Campbell, likewise Earle of Caitneffe. The Counsell determined, that George should take the place due to that Earle, and Glenurchy should be created Earle of Braydalban, Lord Pentland, Holland, and Glenurchy, &c., of a new date only.

3. The Marquis of Douglas produced his charter from King James, giving him right to carry the Crown at Parliaments, Coronations, &c. It contained also, the priviledge of leading the vanguard of the army,



and of the first vote in Parliament, (of which last he is not in possession. —Mar carries the Scepter, and Argyle the Sword.

4. *Item*.—It was debated betuixt Erskin of Cambo, *Rex Fæcialium*, Lyon King at Armes, and Sir Archbald Cockburne of Langton, Heritable Usher, (*Ostiaris aulæ et Parliamenti*,) mentioned in the Laws and A&s of Malcolme Mackenneth, cap. . . .), who should goe nearest to the King's Commiffioner. The Lords, by ther printed order regulating this and the rest of the manner of ryding the Parliament, appointed the Lyon and his brethren heraulds, to præceed the honors immediatly, and the Usher to ride before the Commiffioner, but a litle of at a fyde, that he may not be interposed betuixt him and my Lord Lundors, who carries the Commiffion-purse; so that if the King himselfe ware present, he would ride immediatly before him. See somewhat more of this Parliament in my folio Historique Manuscript, marked G., page 20, 22, and 23.

21 *Julij* 1681.—The Royall Burrows and their agent against the Brugh No. 641, p. 209.  
of Selkirk, for choicing Sir Patrick Murray, (who was not an actual residenter amongs them,) to be their Commiffioner, contrare to the King's letter in 1674, and the A& of Burrows, on which A& they charged him and the Brugh; and he presenting a Bill of suspension, (the Duke of York was present at the debate;) and the Lords fand the said Toun of Selkirk had contraveined the King's letter, and A& of Burrows made thereon, discharging the Burrows to elect any to represent them, but actually trafficking and residenting burgeses; and in the last Convention of Estates, in June 1678, none but such ware admitted; (but I think it would be enough in law, that they had once been burgeses and traffiquers, see the debate in Februar 1673, betuen Sir A. Ramsay of Abbotshall and Francis Kinloch and others, founded on the 8<sup>t</sup> A& of Parl<sup>t</sup> in 1609: it's in the folio Manuscript A., folio 166;) and fand the said A& of Burrows obligator, and that Selkirk had incurred the fyne; which was alledged to be 1000 m<sup>k</sup>s each voter, they being 19 persons on the Counsell. But this fancy of the King's Advocats was rejected by others, who, more analogically to law, thought the said 1000 m<sup>k</sup>s. was only due by the wholle aggregate body of the community electing. But in regard, by the Act of

election, it did not appear who had voted to Sir Patrick, they directed a commission to Hayning, and some other neighbouring gentlemen, to take the oaths of all who gave suffrage, to whom they gave their votes; and reserved to themselves to modify the fine at the advising. Which commission the Lords knew could not be reported this Session, and so upon the matter, the decision of the question devolved to the Parliament itself; especially seeing, in law, the election might be valid, tho they had incurred the penalty, like a tack set by a minister without consent of the patron, (as is recorded by Dury, 9 Novembris 1624, Sir Thomas Hope *contra* the Minister of Syres.) Yet all this cautiousness did not keep the Lords of Session from the censure of some, that they, on the nose of a Parliament, came so near the deciding on dubious elections, which seemed only competent to the Parliament itself; but the Duke of Albanie's presence influenced somewhat this decision. However, this justified them, that the Parliament, by their judicative power, voted and found all the elections of gentlemen for Borrows null, unless they were actually residents and traffickers; tho of old they used to be represented by any they thought fit to choose, tho they were not actually traffickers nor residents. See the Minutes of Parliament besyde me for this page.

No. 642, p.  
210.

*Eodem die.*—At Privy Councell, Philiphaugh and Meldrum's case was again tabled, to terrify Philiphaugh (who was chosen a Commissioner to the Parliament,) from owning the Country party; and Philiphaugh's Shireff-depute was imprisoned for conversing with rebels, and for retarding the King's service on his own private peiks. See their parties, *supra*, pages 168 and 174.—*Vide infra*, pag. 222, their parties.

No. 648,  
§ 2, p. 222.

*6<sup>to</sup> Octobris.*—At Privy Counsell, the process betuixt Meldrum and Philiphaugh (*de quo supra*, pag. 210) being this day advised, the Counsell fand Philiphaugh had malversed, and been remiss in punishing conventiculars, &c.; and therfor they simply deprived him of his right of shireffship of Selkirk, (it not being heritable, but bought by King Charles from his father,) and declared it was devolved in the King's hands, to give it to any other. Some said, seeing the Dutchess of Lauderdale's courtship, by which he had stood, was now dried up, he came weell of that he was not likewise fyned.

[21 *Julij* 1681.]—George Dickson of Hedderweik, pershues James No. 642,  
Hamilton, merchand, for a ryot, for breaking up his truncks without<sup>p. 210.</sup>  
any authority of a magistrat, and taking papers furth their of; which  
was admitted to probation:

24 *Julij* 1681.—The Affise of Error was sustained; *de quo supra*,<sup>No. 642,  
p. 210.</sup>  
page 202.

26 *Julij* 1681.—Mr Donald Cargil and 4 of his disciples ware condemned<sup>No. 643,  
p. 210.</sup>  
for rebellion, and disfouning the King, and hanged the nixt day: but see  
this at lenth in my Historick Manuscript, marked G, page 22.

The Parliament approaching to fit doune, (viz. on the 28 of July,) the<sup>No. 644,  
p. 210.</sup>  
[O]tter-house of the Seffion, that the hall might be prepared, rose on the  
21 of July, and the Inner-house on the 23.

Befydes thir decifions, marked by me *supra*, ther ware some other Law  
Observes this Summer Seffion insert by me as they occurred, in a 4<sup>th</sup>  
Manuscript marked A. 7, from the beginning to the 9<sup>th</sup> page their of, which  
ware not insert heer, because I knew not ther precife tymes and dates.

## OF THE PARLIAMENT 1681.

The Scots Parliament fat doune on the 28 of July 1681, of which see  
the forsaide manuscript G. page 22 and *seq.* I have so many remarks on  
the occurrents of this Parliament disperfed in other manuscripts, that ther  
is litle left for this but gleanings:—See the manuscript intituled The Minuts  
of Parliament, which is a journall and abbreviat of what passed every  
Parliament day. *Item*, the said Historique Manuscript G. in the forcited  
20, 22, and 23 pages. *Item*, the Theologick 4<sup>th</sup> Manuscript, marked A.  
5, pages 84, 86, 87, and 88, but especially page 94 and *seqq.*, wher ther  
are fundry things anent the Succession to the Croun, the Confession of  
Faith, the securing the Protestant Religion, and the Test. *Item*, the

thick 4<sup>th</sup> Manuscript P., folio 43, *et multis sequentibus*, wher is the draught of the A& that was craved for securing our reformed religion, tho another was substitut in its place ; with some observes on it and coronation oaths. *Item*, some reasons against the Test imposed by this Parliament, with fundry other remarks and explanations of the said Confession of Faith and Test. See the manuscript A. 5, page 94, *et multis sequentibus usque ad finem*, wher the Test is largely considered with the Confession of Faith.)

The first thing the Articles and Parliament began with was, the constituting the House, and the determining and discussing the debateable and controverted elections, which were only of five Shires, viz.—Peibles, betwixt Sir A. Murray of Blackbarrony and Nasmyth of Posso, wherin Blackbarrony was præferred ; Eist Lothian, betuen Adam Cockburn of Ormiston and Andrew Fletcher of Salton, on the one hand, and Wedderburne of Goffurd, and Hepburne of Humby on the other, wheir the 1<sup>st</sup> two were found more legally elected ; the 3<sup>d</sup> was West Lothian, wher Hopton and Generall Dalziell was præferred ; the 4<sup>th</sup> was the Merse, betuen Mr. Charles Home and Edgar of Watherly, wheirof the last was sustained ; and betuen George Ramsay of Idinton and Home of Wedderburne, which was left undiscussed ; and the 5<sup>th</sup> was in Stirlingshire, betuen Elphinston of Airth and Stirling of Keir, who were sent back to re-elect ; and it returning dubious for the 2<sup>d</sup> tyme, the Parliament præferred Airth.

In Burrows, Riddel, Provest of Rutherglen, was first imprisoned and then set at liberty, but suspended from his vote on ane accusation of treason against him, for assisting some of the Rebels at Bothwell-bridge. The elections of Mr. Suity for North Bervick, and Sir Patrick Murray for Selkirk, were rejected. Pitlever for Innerkeithen, and James Anstruther for Anstruther, and Cunynghame for Air, [and] Sir James Dick for Edinburgh, tho quarrelled, yet were sustained. Many pretty law questions occurred to be debated in discussing thir elections ; some heritors who had voted to the election of Commissioners were not expressly retoured to a 40 shilling land, but were designed so many oxengates. On this occasion Skein, *de Verborum Significatione, voce Bovata, terræ*, was cited, who affirms 4 oxengate makes a pound land, so then 8 oxgate are a 40 shilling land. (Anent the speciall questions which occurred to be debate in

thir controverted elections, see the informations of severalls of them besyde me.)

It was at this tyme started, If temple lands now holding of the King can be so repute kirklands as att leist a man mozt have 10 chalders of vi&tually or 1000 lb. by year of them, ere he can clame a vote to elect or be elected. See arguments *alibi* from Bengæus, &c. why they are not church lands.

The Bischop of Edenburgh was heard say, in the debatable election of Eist Lothian, that for serving the King, the Committee might verie lawfullie præfer one who was inferior in votes, and they might passe over 4 or 5 votes, to hold out a Shaftsburie: which was spoke verie like one who minded his Parliament oath *de fidei*, to judge according to law!

*Item*, Upon occasion the 13 A& of Parliament 1585, was urged by Sir John Cunynghame, bearing that the King can grant no warrand for imprisoning any person, unlesse it be likewayes subscribed by 4 at leist of his cheiff Officers of State, which is ane excellent A& for security of our persons, that by privy writings we be not imprisoned, without a hearing, or some judicciall sentence and conviction against us. *Vide infra*, p. 217, No. 14.

Third. In the A& of this Parliament, anent the asserting the Succession to the Croun, thesse words (which are tuise repeated) are very materiall, and deserve deep confideration: "That it shall be treason to alter, invert, or suspend the nixt air from the administration of the government, according to the laws of the kingdome." *Ergo*, the alledgiance ceases, if the nixt air administrat contrare to the standing laws for the Protestant religion, or seek to introduce Popery. This consequence is the same with what is deduced from the 15 and 25 articles of our old Confession of Faith in 1567, limiting our obedience to the Magistrat while he does the things appertaining to his office, duety and charge.

Fourth. When the A& anent the Test was brought in and red, the Lord Belhaven stood up and spoke to this purpose, "That he saw a very good A& for securing our religion from on another among the subjects themselves, but he did not see ane A& brought in to secure our Protestant religion against a Popish or phanaticall successor to the Croun." Which words being refented, as if he had meant to speak against a Popish successor's coming at

all to the Croun, which the word *Against* seemed to signify and import, and which was now declared treason by the late A& of Succession; and it being pled, in the hurry and outcry that was raised by some against him, that he might be admitted to explain himselfe; and that being granted, he said, "He was not so much meaning of what might be at present, as what might fall out 100 years hence." This was not judged satisfactorie, but called by some of the Court party worse then the former; and so, by a vote [he] was sent to the Castle; and the Advocat declared ther was matter for ane accusation of treason against him. Yet some dayes thereafter, he was, on his submission at the bar, restored to his bench again. When the vote was asked, "Secure and imprison, or Not?" and the Bischops ware all voting for the affirmative, Sir George Lockhart moved, that being a criminal case, the Bischops ought not to vote therein; notwithstanding wherof, they would not decline themselves, but proceeded. See this debated in papers beyde me, in the case of the English Bischops sitting in Parliament ther, pretending they are ther not as churchmen but as peers.

Certainly Belhaven's meaning (however he worded it) was orthodox and good; that he saw not ane A& securing the Protestant religion from being altered, in case a Popish successor cam to the Croun; which was the main point to be obviated, and for hindring wherof his Majesty had made large offers in England of limitations and restrictions to be put on a Popish successor. Pitmedden represented, that he hoped it was not intended they should be sworne to Episcopall Governement as unalterable, seing Stellingfleet, and many eminent divines, called it only *Juris Carolini*. This was tane very ill by the Bischops; and Edinburgh told it was at leist *Juris Apostolici*, if not *Divini*. And yet this evidently clashes with the King's supremacy, by which he hath the power to set up what externall government and policy in the Church he pleises; as also it contradicts our old Confession of Faith in 1567, cap. 21, wher one Policy in the Church will not serve for all places, tymes, and ages. (See more of this Test and the Confession in the above cited places referred to in the præceeding page; but above all, for the Test and Confession of Faith, see the said manuscript A. 5, page 94, & *multis paginis sequentibus usque ad finem istius libri*.)

One of the main designs of this Test was, to get elections of Commissioners in shires and burrows so packed, as none should vote but these who took this Test, which will exclude all strict Presbyterians, as well as Papists; for I cannot see how an honest Papist can swear this Test.

Fifth. There were many complaints, some of publick affairs, and others of privat concerns, tabled before the Articles, ther to be prepared for the Parliament, such as—1<sup>o</sup>, A bill given in by Sir David Carnegie of Pittarrow against my Lord Halton, Earle of Northesk, Scot of Brotherton, and others, for reducing a decreet of Parliament pronounced against him in 1661, and obtained by the deceased Earle of Dundee, whereby the Parliament annulled a disposition Pittarrow had got from his cousin, the Laird of Craig, of these lands, in prosecution of a former tailzie, and with the burden of his debt, because it was alledged to have been granted after he was made drunk, and without onerous causes, yet the witnesses were not examined upon oath, which see in the manuscript A., in June 1661, folio 50. The Articles granted Pittarrow a warrant on his bill, to summon all the parties concerned, as also to call for the testimonies and other grounds and warrants of that 1 decreet against the Clerks Register or other havers, and that to the 15 of September 1681. No. 644, p. 212.

2<sup>do</sup>, A complaint was exhibited by one William Noble of Dinnotar, or Kipperminschoch, one of the Commissioners for Dumbarton shire, against my Lord Halton, for perjury, in so far as he deposed in Mr. James Mitchell's criminall tryall in that he 1678, knew no promise of life given him; and yet, by a letter produced, all written with his own hand in 1674, direct to the Earle of Kincardine, he wrote that Mitchell had confessed, on a promise of life given him by some of the Committee of Council, (meaning the Chancellor,) that it was he that shot the pistol at the late Archbishop of St Andrews, in July 1668,—which contradicted his oath. But some thought, albeit he had not deposed so cautiously, yet it was not precisely perjury, seeing his letter proceeded on a rumor and misinformation that promise of life had been given him; which the Chancellor having denied upon oath, before Halton deposed, it cleared him that he and others had been in a mistake; and so he needed not in his oath take any notice of that alledged promise, tho there was an act of Privy Coun-

fell that feimed to mention it. (See Mitchell's tryall, in the Manuscript A., at the 7, 8, &c. of Januar 1678, folio 314, & *seq.*; see the full debate in his cause, Manuscript C., page 53, & *seqq.*; see Sir G. Mckeinzie, King's Advocat, his *Idea Eloquentiæ Forensis, actione 3, pag. 78*, wher this pleading of Mitchell's is set doune; *item*, his Criminalls, cap. [29] of Perjury; as also, *Clarus, Gothofredus, Matthæus Boffius*, and other criminalists on that cryme. The Parliament's adjourning stopped the decifion;) but it had the effect of Matchiavell's advise, *calumniare audacter, aliquid semper adhærebit*. Some made a mock allusion to the old history *de Halton quodam A. Episcopo Moguntino perjuro*, who, by a false oath, beguilled Albert Earle of Bamberg, and betrayed him to the Emperor Lowis the 4<sup>t</sup>; (see the story cited from Munster, Carion, Lonicerus, and many authors, in my 4<sup>th</sup> Manuscript, marked A. 5, page 31;) the ridiculous allusion lies in the vicinity of the names. (*Vide supra*, p. 201, Eleis cont. D. Hamilton and Gellie.)

3<sup>rd</sup>, My Lord Bargeny presented a petition in *plain* Parliament, (so that it is not absolutly necessar to goe first to the Articles,) which was red ther, and referred to the Articles, bearing that the witneses who ware to have been adduced against him in the late accusation of treason, as if he had been accessory and assistant to the rebellion at Bothuelbridge in June 1679, viz. Cunyghame of Montgrenan and his man, &c. ware suborned, corrupted, and bribed to have deponed falsely against him, to have taken away his life and fortune; and that by my Lord Halton, Sir John Dalrymple, one Crawford of Ardmillan, and others; (see Montgrenan's deposition beyde me.) Ardmillan, &c. denyed it; so all that this accusation was like to resolve in was an act, or else a letter from the King, declaring Bargenie's innocence in that affair. (See more of this *infra*, page 214, num. 13 & 14.)

4<sup>th</sup>, Ther was ane accusation furnished against the King's Advocat,—1<sup>o</sup>, For reflecting hyly on the Parliament, by saying, he saw seditious Bothuel-bridge faces sitting as members of Parliament. Whereas he alledgedhe spoke only upon a supposition, if the Burrows had liberty to choise whom they please to represent them, factious and disloyal persones might prevail to get themselves elected;—but I hope, ere they entred, they behooved to take the oaths of alledgeance, supremacy, &c. 2<sup>do</sup>, He was accused for



saying, at the tryall of Mr. Donald Cargil, on the 26 of July last, that the permitting the common peeple to read the Scriptures did more evill then good, which was a blasphemous Popish error.

5<sup>o</sup>, Ther was ane indytment given in by Halton, and some other members of the Comittee for the debateable elections, against General-Major Drummond, for accusing them of open injustice and partiality in Parliament, in imposing upon the Committee a cesse-roll, instead of a valuation-roll, for instruing one had a 40-shilling land holden of the King. The thing being thought true, the accusing him was not prosecuted.

6<sup>o</sup>, When Watherly was found by the Parliament legally elected as one of the Commissioners for Bervickshire, the Earle of Home (being peked that his brother was rejected) offered to prove that Sir Patrick Home of Polwart had tane an engagement from Watherly, that he should be against the A& for Succession. Dalhousie urged, that in the mean time Watherly might be removed out of the House, and suspended from his vote. Others urged, since this was ane accusation of treason, to prælimit Members in such a hy point, that Home, conforme to the [49] A& of Parliament in 1587, might subscribe *in pœnam talionis*, and that Polwart, *medio tempore*, might be cited before the Parliament. But the King's Advocat finding Home's information and probation was not good, it dwindled away unto nothing; tho a man should not rashly accuse another; and Watherly gave in a bill craving that the Earle might infist.

7<sup>o</sup>, Ane complaint was given in by Robert Sanders and other printers, complaining of a monopoly of printing granted to ther prejudice, in favors of umquhile Andrew Anderson and his airs, for 41 years. (See ther printed answers and replies beyde me.)

8<sup>o</sup>, The tanners of Edinburgh, and elsewher, gave in a bill against the shoemakers, and other tradfmen who made use of leather, craving the importation of all forraigne leather might be prohibited; and they offered to furnish the country as weell with our oun leather, dressed within ourselves.—See the answers for the Shoemakers, beyde me, proving that the Scots leather is insufficient for many uses.

9<sup>o</sup>, The litfers of Edinburgh gave in a petition, craving they may ather be erected in ane incorporation by themselves, or else adjoyned to some

other deaconry and trade within the toune, as the hat-makers were lately incorporat with the walkers, that they might try and cenfure infufficient work. The Toune oppofed this; fo it was remitted, and recommended by the Parliament to the Magiftrats.

No. 644, p.  
213, sec. 10.

10. Some trades of the toun of Kirkcubright gave in a petition againft ther Magiftrats, craving the Parliament might ordain them to grant them fealls of caufes, and erect them unto deaconries and incorporation. It was anfwered for the toune of Kirkcubright, that our laws had alwayes been jealous of deacons of trades; fee A&ts 77 & 85 in 1426, and A& 52 in 1555; and the Lords decifion in the cafe of the toune of Bruntiland and ther trades in 1680. See the anfvers at lenth.

11. The 12 citizens of Edinburgh who ware fequeftrat and made incapable, give in ane indytment againft Mr. James Rothead, ther toune clerk, for leafing-making of them to the King, contrare to the A&ts of Parliament, and for many other malverfations; wheirol fee the copie befyde me. As alfo, Duke Hamilton complained of the toune of Edinburgh's impofition, they had from the King, of 2 pennies on the pint of ale, as ane illegal taxation; and craved it might be declared treason in any to procure fuch gifts heirafter; of which fee at large *alibi*. The Duke of York put a ftop to both thir two grievances. *Vide infra*, page 221.

12. The Earles of Errol, Marfhell, and Strathmoir complained that they ware diftreffed for 40,000 lbs. Scots and upwards, of cautionrie, wheirin ther predeceffors ware engadged for the deceift Marquis of Argile, by bond to the toune of Edinburgh, as trufties and feoffies for Heriot's Hofpitall, and that ther eftates ware adjudged for it. It is true a forfaultor cuts of all unconfirmed debts; yet fo pious and favorable a debt as that which is due to ane Hofpitall (and fuch debts ought to be excepted out of all forfaultors) ought not to be cut off and defrauded by a forfaultor, wher the fone and air of the perfone forfaulted is reftored to the eftate *per modum gratiæ*; and a bond was taken from him by the King to pay fuch a proportion of the debts, and was *viis & modis*, when his fone married the Dutcheffe of Lauderdale's daughter, gotten back; and tho ftri& law ownes not creditors, yet our Parliaments have had great regard to æquity in fuch cafes, as appears by the 3<sup>d</sup> A& of the Parl. held in 1600,

wher waffalls and creditors are excepted from Gourie's forfaultor ; and by the Roman law the flfk got the eftates of condemned perfons *cum onere debitorum feu æris alieni*. . . . . Argile alledged he was content to be made liable, providing they gave him acceffe and execution for debts he and his father had payed, while they had the right of the Marquis of Huntlye's forfaultor for releiving that eftate, who was reftored to his fortune, without acknowledging thefe debts. However, the Duke of York and his party were refolved to expofe Argile, (becaufe he appeared much for the Proteftant religion, and complied not with them in every thing), and to reftri& him to a locality. But it being infinuat that it was ane encroachment on the King's gift of reftitution of him, to fuffer the Parliament to clip it, the Duke of York projected it might be referred to his Majefty ; which was accordingly done, that the honour of the juftice might be the King's. They alfo alledged againft Argyle, that the reftitution was only to his father's eftate, but that the jurifdictions and fhireffhips were forgotton, and omitted to be infert, and fo he had no right to them. *Vide infra*, more of him, page 225 and 226.

13. *Supra*, page 212, num. 3, we fee it was *mordicus* contended by the Court faction, that nothing could be tabled in Parliament till firft it ware brought in to the Articles ; which feimes to agree with the 218 A& of the Parliament held in 1594, and the A& made in June 1663 : but fee a difcourfe in my Manuscript C. page 152, *et feq.*, proving this is a late novation, deftru&ive of the liberty and power of the Parliament ; and it is thought our Parliaments will never be free of prælimitations till that forme of the Articles now ufed be rectified. They met ordinarily before the Parliament fat, and caufed the body of the Parliament, their conftituents, attend them ane hower or two, looking one to another. It is true, they waited alfo for his Royall Hynesse the Commiffioner, who never appointed an afternoon's meiting, but all at 10 in the morning : and sometymes they fat till 2, 3, or 4 ; and the day the Teft was voted, till 6 a cloak at night ; and then, by furprife, affairs and a&ts ware brought in upon the Parliament, paft in Articles that morning, and very feldom delayed, but put to a vote that fame dyet, that they might not have leifure to prepare themfelves for argueing, nor to deliberat, combine, or take

joynt meafures ; which renders many of our A&ts fo raw and indigefed. See *alibi* of the Roman *Trinundinum* in making ther a&ts, and of the Englifh cuftome in ther Parliament of reading ane a&t 3 feveral dayes ere it paffe. But this is the advantage the foverain prerogative hath got with us over the people.

14. Another point, alfo contingent with this, fell *incidenter* to be debate in the Parliament ; but his Royall Hyneffe fhewing his diflike of it, it was waved ; and it was, whither ther could be two negatives, one in the Parliament, and another in the Articles ? Sir George Lockhart contended, that his Majeftie's negative he had in the Parliament, (which is not very antient with us,) was fufficient to fecure his fupremacy, tho he had it not in the Articles. 2<sup>do</sup>, That the Articles rejecting a Bill ought not to have fuch a negative as to preclude the Parliament from calling for it, if they pleife, and confidering it. But this was ftifled ; and it feemes not materiall wher the King interpoze his negative, whither in the Articles or Parliament, whither before reasoning or voting, or after them ; and it feemes leffe difoblidging to doe it *in initio*, before ther pulfe be found.

15. Cromwell Lockhart of Lee, being one of the fmall Barons of Parliament, and in a long federunt defiring to goe furth, one of the maiffers refufed to open the deor ; wheirupon Lee gave him a thruft, which the maiffer alledged was a ftroak, and fo that he had incurred the penalty of treason, by the [A&] 173 of the Parl. held in 1593, againft any that beats another in the Parliament Houfe while the Parliament is fitting, and the King or his Commiffioner prefent. To free himfelfe of trouble and hazard, (having offended the Duke of York in his voting,) he redeemed his efcape with a fumme of money to the maiffer John Shaw.

16. The Earle of Hadinton, Lord Blantyre, and fundry other members of Parliament, who ware not upon the Articles, claimed liberty to come and fit doune befydes the Articles, and hear the reasoning and voiting, and to have a deliberative and confultative intereft, though they pretended not to a decifive voice ; and this priviledge was founded by them on former cuftome, and a claufe in ane unprinted A&t of Parliament in 1662, fetting doune the orders of the Parliament Houfe. They ware promifed a hearing on this matter from tyme to tyme, but ware wearied

out with delay, till the Parliament was adjourned; (see this debated in other papers besyde me.)

There were many tart and bitter reflections past betwixt severall mem- No. 644, § 2.  
bers, in the heat of ther debates, especially betuixt Duke Hamilton and P. 215.  
the King's Advocat, and some of the barons and the borrows, which are not to be kept on record. I shall only adde heir some remarks<sup>1</sup> on severall of the A&s of this Parliament, that ware brought in, and ather past or rejected; referring the larger accompt to the other places above mentioned.

1. Against the [4th] A& of this Parliament, 1681, making Masters answerable for ther Tennents, or else to remove them, it was urged by Sir George Lockhart in the debate, that it was contrare to the justice of the Divine law, by which the soull only that hath finned is punished, and never the innocent; and by the common law, *noxa caput sequitur*. It was answered by Haddo and Tarbet, This engadging for tennents was no novelty, for it's enjoined by the 8th A& of the Parliament held in 1528. But that means only of the Porteous roll in Circuit Courts. See of this *alibi* on the Privy Councell A& to this purpose.

2. In reasoning upon the [11th] A& against Protections, it was desired by Alexander Milne for Lithgow, that as long as ther was rume left to goe and get Protections immediatly from his Majesty, or the Secretary, for a litle money, the evill would be the same, unlesse the fountain ware stopped. This was resented as a restri&ion on his Majesty. Then it was craved, that thesse Protections granted by his Majesty might be ordained to be regiftrat, (*vide* this *infra*, pag. 322,) that creditors might know them ere they put themselves to the expence of captions and messengers. This was shifted, and left to his Majesty's prudence, to order it as he should think fitt. See A& 47, Parl. 1587.

3. The A& continueing the Excise, for fyve years after the King's death, was desired by some to be annexed perpetually in all tyme coming to the Crown, as a part of the patrimonie theirow; at leift, it might be for

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<sup>1</sup> In addition to the "remarks" that follow, the Author afterwards inserted some others on the margins of his MS.; but these, with a number of his references to authorities, being of no general interest, are here omitted.

7 or 9 years. This was moved by Dalhouffie and the Laird of Airth ; but the Duke of York declared he fought no more but 5 years ; and the truth is, theſe burdens once ſet on foot never fall ; and it was thought it had been more rationall for a Parliament to have kept this, to have gratified a new intrant ſucceſſor with.

4. The King's Advocat moved the [7th] A& for taking away the Summer Seſſion, might containe a claufe impowering his Majeſty, when ever he ſaw cauſe, to bring it back again : 1<sup>mo</sup>, Becauſe it was but a returning to our antient pra&tiſe, *ad principia vera* : 2<sup>do</sup>, The Seſſion being the King's court, he might order the dyets of their fitting as he pleaſed. It was answered, 1<sup>mo</sup>, They ſmelled out the deſigne, that money might be given to ſome courtier to prevail with his Majeſty to bring it back again : 2<sup>do</sup>, The Parliaments had ordinarily taken care of ſetting the dyets of the Seſſion ; and by the [2d] A& of Parliament in 1537, the termes wheiron they ſat then, ware not as now ; ſo a Summer Seſſion cannot ſay, *ſtate ſuper vias antiquas*, with Jeremy. See ſixteen reaſons, why it was more convenient to continue a Summer Seſſion, beſyde me. Many aimed to reſtri& it to a moneth in ſummer, but a total abolition of it was carried in a hurry ; the Proveſt of Edinburgh being ſecure. Some think, tho the Parliament make ane A& upon that which is a part of the King's prerogative, (ſuch as the dyets of the fitting of the Seſſion are affirmed to be,) yet the King may clame to his prerogative, and make uſe of the ſame, notwithstanding of the ſaid A& of Parliament, which cannot prejudice him.

5. When the A& was making anent Religion and the Teſt, the Laird of Gordonſton had a diſcourſe againſt all pænall and ſanguinary laws in matters of religion ; that the conſcience could not be forced, and that theſe ſevere ſan&tions and penalties operated nothing, ſave to render men hypocrites : So that his deſigne ſeimed to reſolve in a latitudinarian toleration, and forbearance of all religious perſuaſions, *de qua alibi*.

6. The ſame Gordonſton, when the [13th] A& anent declinator of Judges was paſſing, repreſented, ſeing a man could not fit Judge in his father or brother's cauſe, why ſhould on be permitted to be ane advocate, to plead ather before his father or brother ? &c. This was flatly levelled at the *Paites*, as they are called ; but not being ſeconded, it dyed.

7. In the A& anent the Oaths of Advocats, &c., ther was ane omiffion in refchinding, fingly and nakedly, the 28th article of the regulations injoyning the oath, and fuffering the 27th article to ftand, which contains the prices to which they are fworne; whereas both fhould have been annulled, and the prices renewed by a new ftatute, feing both the matter of the ftatute, (which is the principall,) and the oath (which is the *accefforium*,) fhould have been once refchinded. Yet the Advocats did all take it with that exprefse quality, fo long as the King and Parliament thought fit to continue it, and no longer.—Yet by the [19th] A& of this fame Parliament, the oaths of minors are declared not to be binding upon them, contrare to the 15 and 24 Pfalme, and the Authentick in the Roman law, beginning thus, *sacramenta puberum, tit. c. Si adversus venditionem*; and fome think nather Pope nor Parliament can difpence any with ane oath, tho our A&s of Parliament declared the oaths of the Covenants null. (See the Differences of the Tyme, dialog. 2, page 107. See Gilbert Burnet's Conferences. *Item*, the Apologie for the Prefbyterians.)

8. In the Bill given in by the Earle of Airly againft Mr. John Dempfter of Pitlever, craving that the Parliament might find he was not excluded by the A& of 40 years poffeffion, tho he had ufed no legall interruption within that tyme; but that he might ftill clame the lands of Pitlever, notwithstanding the faid alledgeance of præfcription, feing, during all that tyme, he was *non valens agere*; for his loyalty was excommunicat and banifhed, and would have nather gotten juftice or redrefe if he had applied to ther Judicatories, and cited Lauderdale's cafe. Sir George Lockhart and others, answered, That the great bulwark of all our properties was the grand præfcription; no pin of it was to be louted. It was *sacrum non tangendum, non movendum*: that *impedimenta juris*, fuch as was my Lord Lauderdale's cafe, (his very right being extinguifhed by a forfaultry, or fequeftation, which divested him, and ftated the right in the Commonwealth, fo as he could raife no action,) did indeed ftop præfcription, without neceffity of interruption, feing all thefe years wherin the legall impediment lafted, ware deducted, and did not run; but whér it was only *impedimentum facti*, that the right of interrupting and purfhueing remained with the Earle of Airly; but it was hazardous or incon-

venient (tho there could be litle in executing a summonds) to interrupt : Never lawyer esteimed that a sufficient interruption ; yet such was the power of the faction, that it was adjudged by the plurality of the Parliament a sufficient interruption. Duke Hamilton urged, it might have been made generall. The decision was so dangerous in its preparative and consequences, that it might have been the countrie's intrest, rather to have contribute the value of the plea to Airly, as to have had such a gape made in their grand security.

9. I find the [5th] A& of Parliament, ordaining all Messengers executions of consequence to be also subscryved by the 2 witneses, agrees with the French custome in the Code Lowis Civile, titre 2, article 2<sup>de</sup>, page 10, *et seqq.* See the Law manuscript, A 7, page 6 and 7.

10. In the [14th] A& anent Baptismes, Burialls, &c., the Bischops wives being also designed ladies, the Noblemen took exception at it, and resolved that, to teach them humility, they would suffer ther ladies to be only called ther wives in the A&. The nobility and barons had some discord, why the small barons should be æqualized with them, in the number of mourners. Yet Tarbet, in some passion, replied, The Lords ought to remember, they ware all one state, and he himselfe had, under the Great Seall, a right to bury under a canopie.

The A& of this Parliament regulating the numbers at burialls is thought to have a politicall eye, to avoid convocations and combinations of subjects in multitudes together ; which Oliver Cromwel was so jealous of, that he discharged horse-races, &c. ; but he had reason to fear, being ane usurper. This A&, when voted in Parliament, discharged any feasts at burialls, except bread and drink ; but this is kept out of the printed A&. Some say, the Duke of York made the A& against pompous funeralls, in pique at the solemnity of the late Chancelor's buriall ; and that it was boasted, the Duke of Modena had not such an interment.

11. The A& for encouradging Trade and Manufactories, inviting all foraigne tradsmen to come hither and set up, and they shall have the privileges of naturalization, &c., omitteth the word, " Protestant " strangers, which is expressly adjected to the 7<sup>th</sup> A& of Parliament in 1669, to that same purpose, by my Lord Lauderdale ; and the omission was judged to be the



influence and effect of our present Government under a Popish commissioner. It has been omitted to except in this A& the noblemen's parliament robes and foot mantles. See the A&s of Apparell in 1621 and 1672, and the notes on them. Some think by the Sumptuary A& of Manufactories and Apparell, made in this Parliament, the wearer of prohibited cloaths cannot be fyned; for all the A& provides is only a punishment on the importers of such forbidden goods, but nothing against the wearers, after the 1 of Aprill; only if it be not imported, it cannot be worn. Yet the A& declares ressetters liable as weell as importers, and wearers may be called ressetters; and farder, the said A& expressly discharges the wearing thesse prohibited goods after the 1 of Aprill; yet one may alledge he knows not if it be imported, or made within the country. Yet I think tho this would defend as to cloaths, yet not as to gold lace, floured filks, &c., for such are absolutely prohibited, tho they ware the manufactory of the nation. 2<sup>do</sup>, It's observable, that the prohibition of wearing, is only annexed to the first classis of goods prohibited to be imported in the beginning of the said A&, but the prohibition of wearing is not repeated in the second rank of the goods prohibited to be imported.

12. In the [21<sup>st</sup>] A& of Parliament, made for regulating Elections in Shires, ther ware 2 points which had been decided by the Parliament's judicative power, as votes and resolves, which yet ware omitted to be engroft in this A&. The 1<sup>st</sup> was, wher, after a hospital acquired a 40 shilling land holden of his Majesty, the master had a vote with the other freeholders in the election of commissioners to shires, and was capable to elect, and be elected, providing they ware infest, and that they only sent one, tho they had never so many severall 40-shilling lands. The 2<sup>d</sup> was, wher one hath only a resignation of lands made in his favors at the tyme of the chusing the commissioners and his voting; but before the meeting and down-sitting of the Parliament, he is infest, or hes got a confirmation from the King of his base infestment, his vote is valide, tho he was not publicly infest the tyme of the voting. But the Parliament miserably varied in thir points, as the wind of favor or prejudice tossed them, as appears by the marginal note on the 35 A& of Parl. in 1661.

13. The [16th] A& anent the Admiralty was judged very exorbitant. Yet Balfour, in his *Practiques*, tit. [Sea Lawis, cap. 83.] of the Admiral, and Sir George Mackenzie, in his *Criminals*, page 394, seemes to assigne that court a very ample and supream jurisdiction. But the Duke of York's being Hy Admiral promoted the A&, and made the Hy Admiral in the A& anent the Test, and the additionall A&, to be omitted. The physicians were likewise omitted to be put in among them who are appointed to take the Test; but if they obtain what they are demanding, to be erected in a Colledge, with power of jurisdiction, then it is thought they, at leift ther rulers, will be liable to take it. As to the abuses in the Admiral court, see A& 157 in 1592, and Craig, *Feudorum* page 120.

14. The [18th] A& anent the King's cumulative Power and Jurisdiction with all his Judges and Magistrats, was looked upon as a mighty extension and stretch towards arbitrarie government; whereas before, the King alone could not imprison with us. *Vide supra*, page 211, num. 2. Yet Craig, *Feud.* p. 192, thinks no superior gives away his jurisdiction to his vassall privative of his owne; but the 62 A& of the Parliament, held in 1475, and the other laws ther cited, do expressly appoint all causes to be perfluend and determined before the Judges Ordinar; and tho the King, in points of government, may commissionat whom he will to take tryall of causes, but it was *inauditum* to assert it in the deciding of privat rights. That he should evocat a cause from the Session to be cognosced by himselfe, cannot be denied; but to delegat 3 or 4 to decide ultimatly a cause depending before the Session, is the unsecurity of the people; and this seimes now to justify the appealls, if not to the Parliament, yet to the King, the Advocats stood for against the Lords; and by the 47 A& of Parliament 1587, the King's privy writings, supercederes, or rescripts, are discharged to be regarded by judges. . . . And by this A&, not onlie in every shire, (which he might doe before,) but in every brugh, he may nominat and adjoyne a lieutenant to the magistrats. —Some observed the word privilege in this A&, was not so weell chosen for the King's prerogative, it importing as much as if his cumulative power ware only *privata lex*, derived from the grant of the people; but in the printed copie of the A&, this word was amended. . . . The

King may adjoin none others to the Lords of Session, by 36, 41, and following A&s of the Parliament 1537, till that A& be expressly rescinded.

15. Ther ware sundry A&s brought in, which ware rejected by the plurality of voices of the Parliament; such as, 1<sup>o</sup> The A& anent the weying of bear, and all other grain, and buying it by weight, as is enjoined by A& of Privy Councill, in December 1679. 2<sup>do</sup> In the A& anent Bills of Exchange, ther was a clause that it should be lawfull for merchands to borrow or lend money at one *per cent.* in the moneth, for the quickning of trade. This was rejected, as being *centesima usura et gravissima*, being 12 in the 100 each year, and opening a door to usury. On the A& anent Bills of Exchange, it was represented, that the exchange is in place of annuel rent, and the re-exchange is for his dammage and intrest, when he layes out of his money, and that he hath no other penalty but this re-exchange. 3<sup>io</sup> That inhibitions should stand even against redeemers of wadsets. (This was spoke against by Sir John Cunyghame, and never brought in again: See the A& of Sederunt anent it, dated the day of 167 [19th Feb. 1680] years.) 4<sup>to</sup> In the [22d] A&, anent the quorum of the Criminal Court, the King's Advocate foisted in a clause, that none should judge as competent to the four pleas of the Crown, which see in *Leges Malcolmi*, and the following books, (viz. robrie, ravishing of weemen, wilfull fyre-raifing, and murder,) but only the Justice Court: this being startled at, it was expunged. 5<sup>to</sup> The A& discharging the publi& debts, providing the debtors take the Test, was craved it might be so cautioned, as the creditors (ere they could reap any benefit of recovering ther debts, on the debtors refusing the Test,) should be obliged also to take it; but this motion was flighted. Some object, [to] the last clause of this A& anent the publi& debts, discharging thesse that ware advanced for the King's home coming in 1650; for tho ther was reason to discharge the debtors in such bonds, yet seing the money was applyed for the King's use, it ware but reasonable the poor creditors in thesse bonds should be now payed by the Exchequer. 6<sup>to</sup> Some thought the halfe moneths cess in favors of the Univerfity of St. Androis, was carried in the negative; but that, by false marking the votes, the Parliament was

imposed upon, and made believe it was carried in the affirmative, which certainly was a impudent boldnesse, if true.

16. The Commiffion for revifing the Laws, A&ts of Parliament, Practiques, &c., may be usefull, if it take effect, and thofse conjoynd agree, or doe not weary for want of salary to recompence ther pains.—It hes been oft on foot. See ane olden A& 54 Ja. I. in 1425, A& 115, Parliament 1487. See the *ante penult* unprinted A& of the Parliament held in 1587, and the 1st unprinted A& of the Parliament 1633. But the moft ample and comprehensive of them all is the printed 47 A& of the Parliament 1649. This is in imitation of Justinian, who employed Tribonian, and fifteen other lawyers, to review the books of law in his tyme, and who compiled from them the *Corpus Juris* we now use: tho some blame them for destroying the authors from whom they made ther colle&tion.—Yet it cannot be denyed but ther are some of our old A&ts of Parliament scarce worth the reading; but in thofse dayes, the laws of other nations ware but very litle more polite. See Stair's *Institutions*, tit. 1. § , pag. . See a designe of digesting the common law of England and statuts, unto a body under titles and heads, in good Latin, in imitation of the Roman law, and a bill given in to the Parliament in Edward the 6<sup>th</sup> tyme, anno 1549, as it is recorded by G. Burnet, in his 2<sup>d</sup> part of the History of the English Reformation, pag. 96; but it took no effect.

17. The Lady Lee having exhibited a complaint against Cromvel Lockhart, hir sone, that he withheld hir joynture and annuity from hir; and he answering that *intus habebat*, and shee was more than payed by intromiffion with his father's executry, to which shee had no right, and for which he had not yet compted. The Articles ordained him to advance hir 500 lb sterling, shee finding caution that if, upon the event of the plea, it ware not found due, it should be refounded. Being brought into the Parliament, D[uke] Hamilton moved, that it might be only 300 lb sterling, which was accordingly ordered to be so restricted by the Duke of York.

18. When the A& imposing the assessment and taxation for 5 years longer was agitat, Duke Hamilton and others urged exceedingly to have

retention of annuel-rents, to help to pay the subsidy, or else to have had so much reik-money imposed on every chimley, which would have fallen most heavily on the brughs; but it was rejected. As for monies bearing a part of the burden with land, see many observes *alibi*.

19. When the clerk, Mr. Alexander Gibson, was calling the rolls, and designing Sir George Gordon of Haddo, Lord Haddo, and Sir Alexander Seton, Lord Pitmedden, because so designed in the Session, and commonly at other times, Duke Hamilton took exception at it, and said they should not be so designed in Parliament, that being only due to temporall Lords; and so thereafter they were only designed by the names and styles.

20. When sundry ratifications were passing, the King's Advocat threatned to protest against them all in the King's name, seing he knew not how far his Majesty might be concerned therein. Argyle answered, such protestation ware to render all ther ratifications ineffe&uall, seing they militated against none but the King, and they were willing the protestation should goe in soe far as prejudged his Majesty of any part of his property. See this, *alibi*. But all the Advocat's designe was, that they might consult him, and so give him money.

21. The Royal Burrows in this Parliament, ware by the Court gulled with the hopes of getting ther priviledges restored against Brughs of Regalities and Baronies, (which ware taken away by the [5th] A& of the Parliament held in 1672,) and in hopes of it, with Isachar, they crouched under the burden, and yeilded to every demand of the Duke of York; but when they brought in ther bill to the Articles, they ware so far from getting redresse, or the Regalities and Barronies declared lyable to bear a part of the burden with them, that the Articles ware like to take more away from them. So the Burrows ware glad to put up ther pipes, and hold them as they ware, besyde the skayth they had got by limiting them to elect non but one of ther oun toun; by the a& of Manufactories and Trade oblidging them to sell off all their wair betuixt and the 1<sup>st</sup> of April; by the a& of Registrations of ther Seafines; and particularly by the a& anent the salt, tho the salt-masters made them a fair offer, that if the Royall Burrows would not bring it home at that price, they would doe it, and oblidge themselves to keip publi& granaries in convenient places, to

ferve all the kingdome; as also the Admiralty A&t, the affesments to the King, and to the Univerfity of St. Androis; the want of the Summer Seffion to fome brughs, and the difcharging the publi&t debts;—all thir ware the rewards the Burrows got for ther cheap fervice to the Court.

22. It was urged, that the A&t of Affaffination might explain what it was; but not being able to agree upon that, it was left in the generall termes, and faid, that it needed no fpecifick definition; but lawyers knew weell enough the bounds and nature of it, and the Criminal Judges might apply it as the cafes occurred. But this opened a door to great arbitrarineffe, to find that to be affaffination which is not.

23. The Toune of Edinburgh delt to have got ther A&t of Counfell, determining the duration of a Proveft only to tuo years, (being afraid Sir Andrew Ramfay might come in upon them,) ratified in Parliament; but Halton ftopped it. 2<sup>do</sup>. They ratified their A&t they have for their water, and the fprings and ground thro which the pipes run, and that none pre-fume to ftop or interrupt them in cleanfing them, or to cut or break them. *Item*, 3<sup>uo</sup>, They obtaine ane A&t, that all their thatche houfes in the fore-ftreet, be within a year taken doune and covered with flait, both for decoration and to defend better againft fyre. They neided no A&t for this, becaufe the [26th] A&t of Parliament in 1621, provides that already; however, fundry other brughs, fuch as Lithgow, Glasgou, &c., craved it might alfo be extended to them, which was granted. 4<sup>uo</sup>, They omitted, throw forgetfulnefs, to get a ratification of ther A&t they have for building only with ftone. 5<sup>uo</sup>, They obtaine ane A&t anent Thomas Moodie's legacy and mortification to them of 20,000 mks, that in regard they have no ufe for a church, (which was the end wherto he deftinated it,) that ther-for they might be allowed to convert it to fome other publi&t work. The Articles and Parliament recommended the Toune to the Privy Counfell, to fee the will of the defunct fulfilled as near as could be; for it comes near to facrilege to invert a pious donation. The Toune offers to buy with it a pale of bells, to hang in St. Geill's fteiple, to ring mufically, and warne us to the church, and to build a tolbuith above the Weft Port of Edinburgh, and to put Thomas Moodie's name and armes theiron. Some

thought it better to make it a stipend to the Lady Yester's Kirk, or to a minister for all the prisoners, to preach at the Cannogat and Edinburgh tolbuiths, and the Correction-house, Sunday about. 6<sup>th</sup>, The Earle of Erroll past a ratification of his office of Hy Constabulary, against which the town of Edinburgh forgot to take a protest; and by vertue thereof, he and his deputies pretend they have right still to judge criminally within the town, tho the Parliament be now adjourned for five moneths and a halfe. I think, in short adjournements, his jurisdiction continues, but where a Session of Parliament is closed by ane A& *salvo jure*, and ane A& of adjournement, his right during that recess and intervall certainly sleeps, especially when the Imperial Honors are also put in the Castle.

24. Ther ware many ratifications, A&s for impositions on bridges, for repairing them: *Item*, A&s for changing hywayes, and referring Hope-ton's bill for that effect to the Privy Counsell, feing he had not the consent of the adjacent heritors besyde Kirkclifton. *Item*, Many warrands for fairs and mercats; but in regard some craved 4 fairs in the year, they ware all reduced and restricted to 2, because they commonly doe cast all the country people louse and idle. Thir ratifications afforded the Lord Register a good summe of money, for the price sett on them was 5 lb. sterling.

25. Ther was ane A& brought in to the Articles, at the mediation of the Wryters to the Signet, for taking away the new A& of Adjudications introduced in 1672, and bringing back the forme and practise of comprisings again. This was opposed by the President of the Session: 1<sup>st</sup>, Because he was author of the said A& of Adjudications: 2<sup>d</sup>, His sone, being a clerk of Session, had much benefit by thesse adjudications. See a paper against them. By the proroguing the Parliament this motion ceased.

There was also a propofall and overture made to this Parliament, anent the minut books of hornings, inhibitions, infeftments, &c., that they should be printed, and publicly sold, and be authentick, that a man for 12 pence might know, from year to year, what incumbrances any lands or estate ware under; and if they ware not to be found in that minute, then they ware not to make faith. But this propaling, denuding, and discovering

too much the weaknes of the nobility and some of the gentrie's estates, was found inconvenient.

26. Befydes the Acts that past in this Parliament, or ware tabled in the Articles, ther ware sundry other proposalls, whispered as designed to be past in A&ts. Such as, 1°. The rescinding the Coronation Oath; which is, upon the matter, done by the A& of Succession, wheir the nixt air succeids immediatly without necessity of ever seeking to be crowned. 2°. A toleration and connivence at the exercise of Popery;—they have not yet pulled of the mask to demand this. 3°. To renew ane act against duells. 4°. That the death of creditors, appryfers of waird lands, within the legall, shall not make the casualities of waird and marriage to fall to the superior, but only the death of the wassall debtor, from whom it was appryfed or adjudged, so long as the legall runs. (See this case, *supra*, page 131, Yeoman.) 5°. To impower the King, and his Privy Councell, hereafter, upon emergents, to raise and impose money without a Parliament; which ware for the Parliament to resigne all ther priviledges, *ad perpetuam remanentiam*; and after such ane act ther neided never another Parliament; and no Parliament could doe this without the speciall commission of ther constituents to that effect. 6°. That the King might conjoyne the Duke of York, his brother, in the governement with him, and assume him sharer in the kingdome, as Queen Mary demitted hir croun to hir sone James, and the Roman Cæsars and Emperors ware commonly tuo at once. (See Scuderie's *Politique des Rois*, in the discours of Dom. Ramir to his estates, advancing his brother partager of the crown with himselfe; it's page 223, *et seq.*) 7°. To complain of severall oppressive gifts and monopolies, and particularly of Mr. Fountaine's gift as Master of the Revells, by which he exacts so much of every bouling-green, kyle-alley, &c., throw the kingdome, as falling under his gift of lotteries. 8°. To allow appeals from the Session to the Parliament. Yet some think our civill rights and intrests as weell and safely lodged in the Session then in a Parliament, who judge more with a biasse, and in a hurry, and with lesse regard to law, then the Lords of Session doe: and indeed, I see Parliaments are very dangerous, where legall privat rights are questioned by courtiers who have favour.



27. In this Parliament, the Chancellor being deceased, the Marquis of Athol, Lord Privy Seall, being the next officer of state, did, by his Royall Hynesse order officiat as President of the Parliament; but nather he nor his Royall Hynesse took much upon them to moderat in the debates. The great champions and Hectors, who managed the debate on the Duke of York's fyde, during all this Parliament, ware the King's Advocate, the Trefurer-depute, Haddo, and Tarbet, who boated with them some dayes after its beginning. Some wise men observed, that the Duke of York might have honestie, justice, and courage enough, and his Father's peremptorinesse, but that he had nather great conduct, nor a deep reach in affairs, but was a filly man.

28. There ware about 20 fitting dayes of this Parliament; and it was adjourned on the 17 of September 1681, to meet again the 1 of March 1682; but some think it will be easier work for them to call a new Parliament, feing the 2 præliminations they have by this Parliament put upon all elections, (the one in Burrows only to choise inhabitants, the other in shires and Burrows, that the electors must first take the Test,) will have that influence in all subsequent Parliaments, they will get elected whomever the Court pleases to recommend, in most Shires and Burrows, manie being thus debarred from elections. But even in this Parliament, the omnipotent vote, like Alexander's sword, cutted the Gordian knot; the Court being at leift 30 or 40 votes superior to the other, of which see ane accompt *alibi*; and ere it was halfe understood, or debate, ther ware the Earles of Airly, Dalhouffie, &c., who cryed alwayes for a vote; tho Duke Hamilton oft rectified the state of the vote, when it was wrong.

During thir 6 or 7 weeks of the Parliament's fitting, ther ware few or no Privy Counsells held. No. 645, p. 221.

1. I remember ther was a contentious debate in August 1681, at counsell between Dunbar of Grange and the Laird of Tanachy, anent a depredation. The Counsell modified Tanachy to pay 1000lb. Scots of damage.

2. Item, a ryot pershued by Mr. William Whyte, minister of Mariecouter againt the Laird of Pitfoddells, &c.

3. After the Parliament rose, the Privy Councell for some dayes met frequently, viz. 20th, 22d, 23d, and 24th of September, 1681, on which dayes the wholle Members and Privy Counsellors present, ther clerks and servants, such as Hew Stevinson, and George Rae, take the Test, and swear it, word by word, upon ther knees; and emit a Proclamation, ordaining all Courts of Judicatories to take it so soon as they fit;<sup>1</sup> which some condemned as a great streatch in the Councell, to attempt to abridge and shorten the tyme granted by the act of Parliament it selfe for taking of it, viz. the 1st of Januar nixt. It was also sent up by the Councell to the Earle of Murray as Secretary, and to Mr. Andrew Foster, his servant; and to the Duke of Lauderdale, and to the Duke of Monmouth, as a Privy Counsellor, and Shireff of Roxburgh or Tivedale: and tho the King's sones be excepted from this Test, yet that most be only meant of the King's lawfull sones; tho the word "lawfull" be omitted to be adjected to the word "sones," but it is to be repeited from the præceeding words "lawfull brothers;" so this will be a great test of his illegitimity if he take it.

4. The incapacity standing upon the 12 citizens of Edinburgh by a former letter of the King's, (*de quo supra*, page 213,) is this day taken of, or rather declared and applyed; for the King's indemnity, in July 1679, discharged them in it's generall comprehensive words; and accordingly, Thomas Robertson, Charles Murray, and others of them, ware brought in unto offices within the Toun at the following Michelmasse election of the Magistrates of Edinburgh.

5. The Privy Councell repones George Earle of Caitnesse against John Earle of Bray[d] Alban, Lord Holland, &c., to the possession of a peice of land alledged taken from him by the last Earle of Caitnesse, when he acted as protutor to the said George, tho Glenurchy now Bray'd-Alban be only a singular succeffor to that last Earle, yet a tutor cannot *ante redditas rationes* assigne; the Councell reserved the point of right to be discussed before

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<sup>1</sup> At this tyme also the standing forces, even to the common souldiers, took the oath of the test in Leith-Links.

the judge ordinar. Bray[d]alban urged Earl George might find caution to remove if he succumbed before the session, he being insolvent, or else continue his possession, and he would find Earl George sufficient caution, but this offer was not regarded.

6<sup>th</sup>. The merchands chopkeepers in Edinburgh gave in a patent to the Privy Counsell, craving they might be erected in a Company and Society, with a guild-hall, &c., (see the double of it befyde me,) and desired the Counsell would recommend it to his Majesty. The merchands adventures first opposed it; but being taken in unto the gift, they desisted. The trades contradicted it; but, whowever, it was recommended. This the merchands of Edinburgh had oft essayed in former tymes, but could never carry it till now. The Duke of York is a great freind to all such designs of companies. (*Vide infra*, page 229.)

7<sup>th</sup>. Some of the Physitians of Edinburgh gave in at this same tyme to the Privy Councill a patent, craving to be erected in a Colledge of Physitians, to have power within Edinburgh and the 3 Lothians, to examine all intrants, and hinder any to practise without ther licence; and to searce apothecaries drogues if they be wholesome, &c. (*Vide supra*, page 217, num. 13.) This was opposed by the Chirurgical apothecaries, by the Magistrats of Edinburgh, the Universities, the Shireffs, and inhabitants within the 3 Lothians, &c. So the recommendation of it to the King was delayed by the Counsell, (tho ther committee had given ther opinion in the Physitians behalfe) till November nixt.

In the Laws of our Kings, which I have in the end of my Balfour's Practiques, I find one of King Reutha, long before Christs birth, ordaining mediciners to be tryed and examined if they be expert, before they assume to practise; and in the dividing the prey it gives [two ribs of the fide] to the physitian, [and as much] to the surgeon, and the tongue to the advocat. King Josina, who reigned some tyme after him, was a great encourager of physitians, as appears by Boetius, Buchanan, &c. See anent this Colledge of Physitians the wryts and informations befyde me. *Item*, the patent of the English Colledge at London, erected by Henry the 8<sup>th</sup>, and ratified by the [5<sup>th</sup>] A& of the Parliament held *anno* 13 and 14 [14 and 15] of his reigne, and the other English statutes relating theirto. (See

E. Chamberlaine's Present state of England, part      page      anent this Colledge. See *infra*, page 228.)

8<sup>vo</sup>. George Gibson, brother to the Laird of Dury, obtains a warrand from the Privy Counsell for printing the Decisions observed by his grandfather, commonly called Durie's Praëtiques, with the alphabetically compend theirow, and prohibiting any others for such a terme of years to doe it. So he expects the printers will offer him money for it.

9<sup>vo</sup>. The Earle of Hadington, as having married the Duke of Rothes's eldest daughter, gave in a petition to the Privy Counsell, craving they would ordaine the charter kist and wryts, in the hands of Mr. John Bayne of Pitcairley's relict and others, might be delivered up to him. The Lord Lundores, as the Chancelor's nearest air-maill, opposed it; but on fight of the tailzie, wher Lundors is very remote, he was found to have no intrest.

10<sup>vo</sup>. The Councell also quæstioned Hadinton anent the right to the shirvalty or shireffship of Fyffe, if it was hæretable? He answered, he was so informed, but he had not yet got inspection of the wryts. The designe was, that ather he *jure mariti*, or some other, most take the Test, seing they could not put it to the Ladie.

No. 646,  
p. 222.

*Primo Octobris* 1681.—Collonel Gage, commander of a regiment for the King of Spain in Flanders, called the Duke of York's regiment, having desired from the Duke some of those prisoners upon the account of their religion and phanaticisme, to be sent away with him as souldiers, to fill up his number: the Duke called a counsell for that effect, and 6 of them, viz. Forman, Garnock, Lapsley, Stewart, Fairrie, and Russell, the most of them young fellows, were brought with a purpose to sentence them to be delivered to him, but they did so misbehave in declining the King, Duke of York, and Counsell, and speaking such notorious treason, that it altered the Counsell's mind, and instead of sending them away, they ordained the wholle to be pannelled at the Criminal Court for treason; *de quo vide infra*, the 7 of October, *pagina sequente*.

No. 647,  
p. 222.

4 *Octobris* 1681.—This day was the election of the Magistrats of

Edinburgh, wher, by appointment of the Privy Counsell, ware present my Lord Halton and the Bischop of Edinburgh, to see them take the new Test ; and ther number of 38 electors not being compleat, they could get none of the citizens perswaded to come in and supply the roome of the absents, or to officiat *pro hac vice solummodo*, unlesse they ware dispenced with the Test, they being no farder concerned but to give ther fingle vote ; wherupon, thesse Lords Assessors dispenced theirwith as to them, because it was only to be tane by the elected, and not by the electors, this year, seing the 40 dayes since its promulgation ware not yet expired. Some thought they took more upon them than the wholle Privy Counsell could doe, to exeime any voters from taking the said Test ; and that all their security and warrandice could not defend the voters from incurring the losse of ther escheat, if they ware questioned theiron.

6 *Octobris* 1681.—At Privy Counsell, the Laird of Hopeton having a bill in for changing his hyway, (*de quo supra*, page 219,) the Counsell took occasion to call him to take the Test, as Shireff of Lithgow, or West Louthian ; and upon his tergiversation and refusall, vindicating his loyalty to the King, the Counsell, by ther sentence, declared that he had lost his right to that shireffship during his life, (it being hæretable) and the supplying of the vacancy belonged to the King. No. 648,  
p. 222.

2<sup>d</sup>. The proceffe betwixt Meldrum and Philiphauch, (*de quo supra*, page 210,) being this day advised, the Counsell fand Philiphauch had malversed, and been remisse in punishing conventiculars, &c. ; and therfor they simplie deprived him of his right of shireffship of Selkirk, (it not being hæretable, but bought by King Charles from his father,) and declared it was devolved in the King's hands, to give it to any other. Some said, seing the Dutcheffe of Lauderdale's courtship, by which he had stood, was now dried up, he came weell of that he was not likewayes fyned.

7 *Octobris* 1681.—At Criminal Court, the 6 persons mentioned in the preceeding page ware pannelled for Treason, on ther declarations they had made before the Privy Counsell on the 1 of October last. The King's Advocat being in Angus, sent over a deputation to me to pershue, as his No. 649,  
p. 223.

substitute, in that cause ; but God so ordered it that I was freed, and Sir William Purves eased me of the office. In fortification of what they had said before the Duke and the Counsell, they led the Clerks and Maisters of Councell witnesses, who deponed, that upon the matter they uttered thesse or other such like words : “ They declined the King, and denyed him to be ther lawfull soveraigne ; and called him a tyrant and covenant-breaker.” And Forman had a knife with this posie and inscription graven on it : “ This is to cut the throats of Tyrants ;” and said, “ If the King be a tyrant, why not also to cut his throat, and if they were righteous Judges they would have the same on their swords, like Buchanan’s motto, borrowed from the great Emperor Trajan, *pro me ; fin mereor, in me.*” Garnock having, at a Committee of Counsell, railed on Generall Dalzeel, calling him a Muscovia beast, who used to roast men, the Generall in a passion struck him with the pommel of his shable on the face till the blood sprung. This Marnock [Garnock] gave in a testimony and protestation, all written and subscribed with his hand, calling them all bloody murderers and papists ; and charging all the Parliamentars (as he termed them) quickly to reverse and disannull ther wicked laws they had made, and that Popish Test they had been taking, and to put away that finfull man, (this was the Duke of York,) or else the judgements of God ware ready to break upon the land. Lapsley was wiser then the other 5 ; for he owned the King, in so far as he owned the Covenant, which he swore at his coronation in Scoon, and would nather goe back nor forward, nor say any more ; so they not being able to reach his life, the dyet was deserted against him, and he sent back to the thieffs hole to be fettered again ; but whille they ware on the pannel the bolts ware tane of them, so *non dicebant causam ex vinculis*. Before the inclosing the Affise, they gave in another paper, subscribed with all ther hands, charging ther blood on the Judges, and summoning them to answer at God’s tribunal, and reflecting on ther unjust and barbarous dealing with Mitchel, Messrs. John Kid and King ; (and alledging Mr. John Eleis, for pershueing them, dyed with horrors ;) and in killing James Lermont only for being present at a feild conventicle, wher a man was killed, &c. Thir 5 ware found guilty by the Jury, and condemned to be hanged in the Gallowlee between Leith and Edinburgh,

on the 10 of October; ther heads to be struck of, and fet up on pricks upon the Pleasants port of Edinburgh; and Forman's hand (who had the forsaide knife,) to be cut of alive: All which was accordingly done; and they dyed obstinately, without acknowledging any fault, or retracting ther errors, or allowing ministers to pray for them; but reviling and condemning ther judges, and all that differed from them. Ther bodies ware stollen up by some of their partie from under the gibbet, and reburied in the West church-yaird.

11 *Octobris* 1681.—The Duke of York called a counsell extraordinar, No. 650, to fend away 4 more of thesse unhappie peeple of so deluded principles, p. 223. with Collonel Gage, to Flanders. When they ware brought in, they began in that same very strain and dialect with their neihbours who ware but hanged the day before; but the Duke caufed hastily remove them, that they might not also hang themselves with their ouna tongue.

2<sup>do</sup>. This Counsell day, ther ware 6 houses named for putting garrifons into in the Westren shires, viz, the Castle of Evandale in Strathaven; the house of Freuch, lately forfaulted—belonging to the Earle of Loudon; the house of Earlestone, also forfaulted, &c.

*Eodem*, 11 & 12 *Octobris* 1681.—The Synod of Edinburgh having met No. 651, thir dayes, and the Bischop proposing the Test to them, and finding p. 224. them unclear, desisted at this time; wheiron they scrupled to continue the meeting, leift they might incurre the certification of the A& by ther fitting and not taking it; but he declared they should be in no hazard upon that account.

#### WINTER SESSION, 1681.

*Primo Novembris* 1681.—This day ther was a new commiffion for the No. 652, Session from his Majesty produced and read, wherin President Stairs, p. 225. Glendoick, Clerk Register, Newbyth, all Ordinary Lords, and Argyle, an Extraordinar, ware left out and discarded; and in their rouses Haddo

Tarbet, Boyne, Drumcairne, and Queansberry, ware brought in. They took the oath of the Test this day, and intimated to the advocats, and other members of the Colledge of Justice, to compear, and likeways take that oath; which was accordingly obeyed by many.—Anent the strange singularities of this new commiffion, and of the severall steps and degrees in the taking of this Test, see large and full remarques in my 8vo. manuscript of the Seffion occurrents, at the 1 of November 1681, from page 47 till page 65, by the space of eightein pages, wher this great revolution and its causes are searched into.

No. 653,  
p. 225.

3 & 4 *Novembris* 1681.—At Privy Counsell Sir Patrick Hepburne of Black-castle, is fyned in 200lb sterling, because on Mr. Gabriel Semple, *alias* Lauder, because his mother's name, ane intercommuned fugitive Presbyterian minister, was refet at his house in Auldhamstocks; tho Sir Patrick was not ther himselfe, and the said minister was his coufin, and came thither sick, which might all serve to alleviat; yet he was decerned to pay the said fyne within 6 dayes.

2<sup>do</sup>. One Patrick Burre, a drummer, being strugling in a quarrell with some fleschers, he discharges a musket on them, and instead of them he killed a woman accidentally standing by, and who was great with child, and so both shee and the child dyed. He alledges the gun went of casually, and he did not designe to shoot it; for law is clear, if he designed to shoot it at the fleschers, tho he kill another in *rixa*, and not him whom he intended to kill, yet it is *homicidium præmeditatum in genere*, tho not *quoad* the person killed, and so is punisheable. The generall and his officers intending to judge him by martiall law, and the woman's husband and freinds fearing they might absolve him, applyed to the Privy Counsel, and got it remitted by them to be tryed by the Criminal Lords of the Justiciarie, it being *delictum commune*, and not *proprie militare*. Likeas they ware the first attachers, which rule of prevention is observed with us, but not in England, wher sojors are judged by common law.

3<sup>do</sup>. A letter is sent from the King, mentioning a former, appointing, in absence of the Chancellor, the Privy Seall to præside in Secret Counsell, and in his absence my Lord Halton; but now allows the Counsell in such



a caſe to choiſe ther Prefident out of ther oun number, which ſeemes to have been procured as an affront to Halton.

4<sup>th</sup>. The Earle of Argile being called for to take the Teſt, as one of the Commiſſioners of the Treasurie, he did ſwear it, but with this explanation, (which he openly declared) that he conceived this Teſt did not bind him up nor hinder him from endeavoring alterations to the better, ather in church or ſtate. (*Vide infra*, more of this, page 233.) This inſinuation, *quoad* the State, if expounded of the monarchie or ſucceſſion, ſeemes dangerous. (*Vide ſupra* of Argile, pages 213 and 214.) This was not noticed that night, but the nixt day his ennemies repreſents this as a ſeditious explanation to the Duke of York, and prevails with him to call a counſell, whither Argile is ſent for, and he is required to ſwear the Teſt ſimply, without any quality. He refuſes, and adhæres, and gives it in in wryte. The Counſell, on this, holds him as a refuſer of the Teſt, and declares all his places void. He, with great magnanimity, firmenes, and conſtancie of ſpirit, answered, ſeing he could not ſerve his Majeſty and the Royall Family any more in his counſells within doors, he ſhould never be wanting to doe them all the ſervice in his power without doors.—It was obſerved they chuſed the Marquis of Montroſe præſes in counſell this day, of purpoſe to pique Argile, on the old diſcord betuixt Argile's father and Montroſe's grandfather. (Of ther quarrel againſt Argile, ſee the forſaid 8vo. Seſſion manuſcript, page 47, *et ſequentibus*. See Argile's explanation, with the Biſchops, the ſynod of Aberdeen, and my oun, in my manuſcript of Seſſion occurrents, marked J. page 59, *et ſequentibus*. *Vide infra* this page.)

5<sup>th</sup>. *Eodem tempore*. Ther came doune a commiſſion from his Majeſty to examine the accompts of the Treasurie, how the King's publiſt money hath been ſpent and employed theſſe ſeveral years bygane. This was principally levelled againſt Halton, treſurer-depute, becauſe the moſt of thoſſe who ware named auditors to thir counts ware none of his freinds.

7 *Novembris* 1681.—At the Criminal Court, Mr. Robert Martin, clerk, No. 654, having delayed and ſhifted to take the Teſt, Mr. Thomas Skeen, advocat, p. 226. was inſtalled by the Juſtice-Clerk to officiat in his rounge.

2<sup>d</sup>. Riddell, Proveft of Rutherglen, is perfuaded by David Spence, clerk ther, for acceffion to the late rebellion at Bothuel Bridge. The Affife returned him guilty only of this one expreffion, "They are our ounes lads," (for he had a fone and a nephew ther,) "we moft not let them want;" fo meat was furnifhed them. Thir words ware judged ane approbation, however naturall affection may alleviat. The Juftices delayed to give fentence againft him till the 14 of November.

3<sup>d</sup>. One James Sinclar is perfuaded for ravifhing a woman. The witneffes being adduced, it appeared that fhee concurred as voluntarily as he, except one woman whom fhee had corrupted, who deponed fhee hard hir cry in a ftugling, "You fhall never get your will of me." The Inqueft clenged him, and fhee was imprifoned for her impudence. It feemes rapt does not prefcribe with us within 24 howers, as the tenth chapter of the 4<sup>t</sup> book of *Regiam Majestatem* infinuates.

No. 655, 8 *Novembris* 1681.—At Privy Counfell ther is ane order paff, *nemine*  
p. 226. *contradicente*, for fecuring and committing the Earle of Argile in the Caftle of Edinburgh, and commanding him to enter his perfon ther betuixt and the nixt day at 12 a cloak; and that becaufe the King's Advocat, Tarbet, and others affirmed, he by the written explanation he offered on the Teft, had mifconftued the King's laws, and ftudied to fow fedition and leafings betuen the King and his peeple, (*vide* the beginning of this page,) and fo had incurred the pains of the 107 A& of the Parl. held in 1427, and of the 10 A& in 1585, for depraving and mifconfttrueing the King's laws, or raifing jealousies and difcord betuen the King and his peeple, which is different fomewhat from leafing-making, and is declared punifhable by the faid laft A& with death.

No. 656, 10 *Novembris* 1681.—At Privy Counfell, Cunyghame, Proveft of Air,  
p. 228. (having voted againft the Duke of York in the laft Parliament,) is perfuaded for joyning with the late Rebels in 1678, in fo far as fome 7 or 800 of them, came with Mr. John Welsh, minifter, to the faid toune, he being Proveft, and took up ther quarters ther all night, and with whom he fo far concurred, as he gave them billets, affigning them ther particular lodg-

ings. The defences ware, 1<sup>o</sup>. The A& of Indemnity in July 1679 ; which was repelled as not extending to Heritors, as the Proveft was. 2<sup>do</sup>. That what he did was not voluntarily, but extorted *vi majore*, to keep the toun from being robbed and pillaged, which was a good office, and he was not able to refist or detain fo great a number, which in all cafes ought to excufe. (See the A& 13 and 14 Parliament 1551, and the marginal notes ther ; and Sir G. Mackenzie's English Pleadings, 15 plead. page 174, wher it appears that compliance with ane ennemy, wher we have not power fufficient to refist them, is no cryme.) However, the Counsell fand the libell relevant againft him.

*Eodem die*.—The fame brugh of Air, *item*, the touns of Coupar in Fyffe, and Queansferry, are perfhued, either for not ele&ting ther Magiftrats at ther ufuall tyme of Michaelmaffe laft, or elfe for ther Magiftrats not taking of the Teft. The Counsell declared the laft tuo brughs had loft ther priviledge of choifing this year, and therfor the ele&tion had fallen and devolved in the King's hands, and he and his Counsell would name ther Magiftrats.

11 *Novembris* 1681.—In the Seffion ther was but flow procedure as No. 657, yet, throu the demurr and interruption Advocats and Agents made in <sup>p. 227.</sup> taking the Teft injoyned by the late A& of Parliament.<sup>1</sup>

17 *Novembris* 1681.—At Privy Counsell, the Phyfitians' patent of erec- No. 660, tion in a Colledge was recommended to his Majefty, to be paff his Royall <sup>p. 228.</sup> hand, but with great refervations in favors of the Toune of Edinburgh, of the Univerfities, and Chirurgeans ther priviledges. (See more, *supra* pag. 221 *et fequente* ; fee the double of this patent *alibi* ; *vide supra pagina* 226, Chirurgians and Apothecaries.)

2<sup>do</sup>. Alexander Lindfay, George Wedderburne, John Cairnes, and others, who had a gift from the C[lerk] Register of printing the Acts of Parliament, gave in a complaint againft Andrew Anderfone's reli&,

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<sup>1</sup> [This sentence in the MS. forms a parenthesis, in connexion with a case before the Court, as reported in Fountainhall's Decisions, vol. i., p. 161.]

called Agnes Campbell, and Patrick Tailzfer, hir present husband, that they attempted to reprint the A&ts of Parliament lately made. Alledged, hir husband and sone ware, by gift in 1671, the King's printers, and nothing could be the more proper object of ther employment then to print the King's laws. Yet the Privy Counsell discharged hir to medle therewith, and ordained the copies already printed to be given up by hir, and to be brunt; and certified hir, if she contraveened heirafter, shee should be fyned.

3<sup>th</sup>. William Cunyghame, Provest of Air, (*de quo supra* page 226,) is sentenced, viz. sent to prison in the Tolbuith of Edinburgh, and fyned in 200 lb. sterling, and ordained to ly in prison, not only till his fyne be payed, but likewayes during the Counsell's pleasure; and referred him to be persued in the Criminal Court, for treasonable complying with Welsh and the Rebels, in quartering and billeting them; as also for forgerie, in returning a report to the Counsell, that the Magistrats of Air had taken the Declaration at ther election, and entry to ther office, wheras they took it not for some moneths after. But the reason of that was, because some of them ware abroad when choisen, and as soon as they came home, they took it; and yet all ther subscriptions boor one date, as if they had signed it on the day of ther election.

4<sup>th</sup>. The Bischop of Edinburgh having proffered the Test to his Ministers, and some of them having refused it, he made a report of it this day to the Duke and the Counsell; wheirupon the Counsell called for the Magistrats of Edinburgh, and intimat to the Provest, that they had declared the places of thir 4 Ministers void, viz. Meldrum, Kinneir, Wilkie, and Kay in Leith: (This was ane instance and practise in the King's supremacy in ecclesiasticks over churchmen, wheras, properly, they should be only deprived by ther ounne peers, or the Bischop); and ordained the Toune to fill ther places immediatly. This was done to terrify the rest; and tho the Magistrats too hastily filled some of ther places, yet the Ministers had till the 1 of Januar to deliberat, by the A& of Parliament, anent the Test; and the Toune Counsell of Edinburgh, as patrons, had 6 moneths by the law of the Kingdome, to present *in vice*.—By the *jus devolutum* they could be deprived of that *vice* of presenting.

18 *Novembris* 1681.—At Exchequer, the Merchants of Edinburgh's patent of erection in a Company, being past by his Majesty, and returned <sup>No. 662, p. 229.</sup> doune, was this day likeways past in Exchequer; but clogged with a reservation of the rights and priviledges of the Trades of Edinburgh, that it should be without prejudice therof, (*vide supra* page 221.) It was furnished that the Directors of this Company ought to take the Test.

2<sup>da</sup>. The Exchequer gave Sir Alexander Bruce of Broomhal a protection for a moneth to clear his compts with them; and after serious reading of the late A& of Parliament in 1681, strictly discharging Protections, yet they judged themselves authorized to grant one in this case.

22 *Novembris* 1681.—At Privy Counsell, his Majesties Letter approving <sup>No. 665, p. 229.</sup> of ther explanation of the Test was red. See both printed.

2<sup>da</sup>. Ther was a Letter from the King, approving and ratifying all ther procedure against Argile, and ordaining them to proceed against him according to law; but not to sentence, till he be acquainted, and the wholle referred to him.

3<sup>da</sup>. Mr. Andrew Lumfdean, minister at Dudingston, is accused for having preached against the Test, in so far as he, speaking of the tymes, did say, "Instead of bread, stones were given us, which gravelled and broke our teeth; and instead of fishes, serpents were offered to sting and poison us, which nather we nor our posterities would get digested;" and on this he cited that of the prophet; "We looked for peace, and behold trouble:" all which they applyed to the Test. His meaning was referred to his oath. He deponed, tho, by tenderneffe of conscience, he was unclear to swear the Test, yet he purged himselfe of any designe of reflecting on it; but his text from John                      led him naturally in to regrait the division, schisme, and rent is in the Church; and all the former expreffions tended only to that purpose. He was affoilzied; tho he, as a young man, was staged designedly, to fright others.—Yet this way of purgation of ther meanings was looked on as singular, called by lawyers *juramentum purgationis*.

*Eodem tempore*.—Joseph Broun and James Clerk having pointed the <sup>No. 666, p. 230.</sup>

Earle of Argyle's cabinet, furth of the Cunzie-houfe in Edinburgh, for a debt owing to them by the Earle's bond, and the faid cabinet being refcued from them by violence, they gave in a bill of complaint to the Privy Counfell of the ryotous deforcement. The firft defence that was proponed was, that the Cunzie-houfe being in law a fanctuary, no legall poindings or diftrinzeings could be ufed ther. It was answered, 1<sup>o</sup> It was not knowen whether it was by law or ufurpation that the Cunzie-houfe clamed the priviledge of ane afyle, refuge, and fanctuarie. At the moft, it could prote& and defend none but the perfones of the fervants who ware immediatly imployed ther to work in the fervice of the King and kingdome, or to impede their tools or instruments from being poinded, they deferving as great a priviledge as pleuch graith hes; but it was *inaudutum* and unreasonable to extend this to defend extraneous perfons running in ther to avoid captions, much leffe to fecure the goods and plenifhing of ftrangers; for if this ware once allowed, then the Abbey, the Cunzie-houfe, and fuch other places as pretend to be fanctuaries, fhould refett the goods, wair, and furniture of all dyvors, fo that creditors fhould not reach it, which is abfurd. They, fearing the event of this, alledged, that the wright who made it retained it *jure tacite hypothecæ*, (which he hes not if it be once delivered, for then *fidem fequitur emptoris*,) till he was payed for the price of it. (Anent the priviledges of fanctuaries, *vide fupra*.)

No. 668, 24 *Novembris* 1681.—At Privy Counfell, ane order<sup>1</sup> was made that fuch p. 230. Royall Burrows as had not elected ther Magiftrats at this laft Michelmaffe becaufe of the Teft, that they fhould be charged with horning to elect betwixt and the            day of            , under the pain of being denounced rebels if they difobeyed, and fuch as had elected that the Magiftrats fo chofen fhould be charged to embrace and accept under the fame pain. *Item*, one Mr.            Welſh, Miniſter at            is ſtaged for preaching againſt the Teſt, and is put to purge himſelfe. (See Mr. Andrew Lumsdean's caſe in the forgoing page.)

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<sup>1</sup> See my folio collection of Craigie's Practiques *in fine*, folio 41 *et ſeq.* wher ther are Acts of Counsell like this.

29 *Novembris* 1681.—At Privy Counsell, a woman is secured for forging and making of false coine. No. 671, § 2, p. 232.

12 and 13 *Decembris* 1681.—Thir 2 dayes ware taken up with the Earle of Argile's Proces at the Criminall Court, wher the libell is found relevant by the Justiciars to infer treason; and it being proven he gave in that explanation which they fand treasonable,<sup>1</sup> the Affise could not (being so determined by the Interlocutor,) but find him guilty of treason and leasng-making; but assoilzied him from the article of the perjurie. (See his indytment and defences besyde me, as also many observes on this od and severe usage in my Historick folio manuscript, page 27, and in a 4<sup>th</sup> one, and in many other places.) No. 679, p. 233.

Ther was a great outcry against the Criminal Judges ther timorous dishonesty. The Marquis of Montrose was Chancellor of his Affise. Sir George Lockhart called it lucrative treason, to the advantage of Church and State; and admired how a man could be condemned as a traitor, for saying he will indevor all amendements he can to the advantage of Church and State: for this is not to conspire *in necem et perniciem Reipublicæ*. But the treason was alleged to ly in this, that his explanation did not bear that he should indevor alterations to the better, with his Majesty's consent; but without any regard whither his Majesty disaffented or not, he made himselfe sole judge what alterations ware advantagious, and of the lawfulnessse of the means and indevors to alter, which resembled to much the words and meaning of the treacherous Solemne League and Covenant. 2<sup>do</sup>. These words "any alteration," are indefinit, and æquipollent to the universall, "all alterations," (this is sophistical,) without so much as excepting the Monarchy and fundamentalls of government. 3<sup>th</sup>. These words, "consistent with my loyalty," ware judged taxative and restrictive, seing his loyalty might be far below the standard of true loyalty, not five-penny fine, much lesse eleven-penny. Whatever ambiguity might be in the words, if strained, (the clearest paper in the world may be thus made to

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<sup>1</sup> *Vide supra* 225 *et seqq.* of this. See beside me, S. G. Mackenzie's printed Vindication of my Lord Argile's forfaultor, against the pamphlet called the Scots Mist, &c.

infer treason, if tortured,) or inconsideratenesse in this explanation ; yet all ware fully convinced, that in such cases one ought to be allowed to interpret his owne words, (which Argile did very neatly in a speech to the Lords, as also modestly represented his great sufferings and services for his Majesty,) and that, (tho they deserved some lesser punishment,) yet it was called a diabolicall alchymy, to scrue them to treason.—But desperation since this tyme hes made him shipwrack his loyalty and all, so that no more charitie can be bestowed upon his explication.—The designe was to low him, that he might never be the head of a Protestant party, and to annex his jurisdictions to the Croune, and to parcell out his lands ; and tho he was unworthyly and unjustly dealt with heir, yet he ought to observe God's secret hand punishing him for his cruelty to his owne and his father's creditors and vassals, fundry of whom ware starving. (See more of this, *infra pag. sequente in principio, item pag. 235*, in two places of it.)

No. 680,  
p. 234.

15 Decembris 1681.—The Privy Counsell, to strick terror in any who complained of the injustice of Argile's Interlocutor, and to preserve St[r]athurd, Forret, and Neuton from opprobrie, in voting the explanation treasonable, Colinton having been *non liquet*, Harcous voting it was not treason, and Queansbery, Justice-Generall, concealing his vote, in regard it was carried affirmatively ere it came to him, (see the preceeding page, *item* the 8<sup>vo</sup> manuscript of Session affairs, page 65 : see the following page,) the Counsell, I say, named a Committee to call my Lord Argile's eight Advocats, (viz. Sir George Lockhart, Sir John Dalrymple, Mrs. Walter Pringle, David Thoirs, Patrick Home, John Stewart, James Grahame, and my felfe,) for subscribing our opinion, that his explanation contained nothing treasonable in it. We ware examined, but not on oath ; and it was called a new practise to signe opinions with us, especially in Criminall cases importing treason, and a bad preparative ; tho lawyers should not be prelimited nor overawed freely to plead in defence of ther clients ; the Privy Counsell having authorized us to that purpose.—Tho some aimed at imprisoning and depriving us, yet after we had spoke with his Royall Hynesse, he was pleased to passe it, tho he said, if any bad use ware made of our signed opinion, by spreading it abroad in England



to incense them, or reproach the Duke or the Judges, he could not but blame us. It was afterwards printed in England, and Argile's tryal, with another peice called, "A Scots Mift to weet ane Englishman to the Skin;" being fundry animadverfions on Argile's proces.

20 *Decembris* 1681.—This night, about 9 a cloack, the Earle of Argile, No. 686, fearing his life might be tane, escaped, *incognito*, out of the Castle of Edinburgh, under the disguise of [a] page; and holding up the train of Lady Sophia Lindsay, his step-daughter, and sifter to the Earle of Balcarrhouse. p. 235.  
—No punishment was inflicted on hir. In 1645, the Earle of Airly escaped at St. Androis (when they intended his head,) by his sifter's help. Ant. Matthæus in his Criminalls, tit. *de effractoribus carcerum*, tells, that the eminent H[ugo] Grotius was stollen out of prifon by his wife, and carried out in a coffer, and thus substracted from danger.<sup>1</sup>

21 *Decembris* 1681.—The case betuixt the Marquis of Huntly, and Gordon of Lefmoir, anent a submission, &c., was decided in favors of Lefmoir. No. 687, p. 235.

22 *Decembris* 1681.—At Privy Counsell, Frazer of Bray was confined No. 688, and sentenced to perpetuall imprisonment in Blacknesse castle, and fyned p. 235. in 5000 marks for breaking his former instructions, and preaching in house conventicles. He had a very pretty discourse on the King's ecclesiastick supremacy.

23 *Decembris* 1681.—Mr. Thomas Ramfay, minister at Mordington, No. 689, offering a cautioner in the louseing ane arreiftment, laid on by Helen p. 235. Ramfay, his sifter, and James Aikenhead, apothecary in Edinburgh, hir husband, on a depending proces; and the cautioner being refused by Sir William Bruce, clerk to the Bills, and Mr. Thomas offering *cautionem juratoriam*, that he could not find a better, the Lords absolutly refused to allow it in this case, tho they admitted it in passing suspensions.

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<sup>1</sup> Casuists doe allow one to flee when he meets with injustice, and flight then is no argument of guilt. See Bishop Hall's cases of conscience, decade 2, case 4, page 101, and page 136.

No. 690, 23 *Decembris* 1681.—Argile was this day sentenced and forfaitured in the Criminall Court in absence, and the sentence of death was pronounced against him as a traitor; only tyme, place, and manner of his execution (when he should be apprehended,) was remitted intierly to his Majesty; and with sound of trumpet, both in the Court and on the Croffe, his coat of armes was torne by the Lyon King at Armes and his brethren heraulds, and reversed, and ordained to be expunged out of the books of Herauldrie; and his posterity and blood tainted, and declared incapable of all honors, dignities, offices, &c. (See the præceeding page, *item infra* page 252.) *Nota.* The [11<sup>th</sup>] A& of Parliament [1669] allowing forfaiturers in absence, is only in the case of Perduellion, and rising in armes against the King by nottor rebellion; which was not the species of my Lord Argile's crime; but they will get what they have done against him ratified in the first Parliament that meets; and the Judges are not secure without it. Likeas he could not be esteemed altogether absent, feing he was present at the debate, interlocutor, closing the affise, and reading the verdict, and only escaped before sentence pronounced: yet some quibled, that a citation should have præceeded, to hear sentence pronounced.

No. 691, *Eodem die.*—Sir W<sup>m</sup>. Bruce, upon a transaction made with Mr. James Anstruther, (who gave him considerably for it: see it in my 8<sup>th</sup> Session manuscript, page 64,) demitted and resigned his place as Clerk to the Bills, and Mr. James was installed therein.

No. 692, 26 *Decembris* 1681.—Upon searching Argile's papers, ther was a memorandum found of James Stewart the advocat's, reflecting on the Governement; on which ther was ane order privily ishued out to seize on him; but, before the search, he escaped, and went to Holland. Some others, and my selfe, were called to the Committee of Counsell, to see if we could give any account of that paper, or if it had been produced to us at our consultations with the Earle; but I had never seen it before.

## ANNUS 1682.

5<sup>th</sup> *Januarij* 1682.—Mary Gray, who was ravished, (*supra* page 172, No. 695, § 2, 178,) is, by order of the Privy Counsell, sequestrat in the hands and house of the Proveft of Edenbrugh. p. 236.

10 *Januarij* 1682.—At Privy Counsell, Home of Eccleffe pershues Jean Dalrymple for a ryotous illegall poinding, and fhee him for a deforcement. Arthur Forbes and the Master of Salton have also a plea this day. No. 697, § 2, p. 236.

12 *Januarij* 1682.—At Privy Counsell, the Chirurgians' signator of a ratification and confirmation of all ther former priviledges, superscryved by his Majesty, and fought to secure them against the new erected Colledge of Physitians, was debate; and the 13 A& of the 10 Parliament of King James the 6<sup>t</sup> in 1585, was objected against it, that it boor unufuall clauses, such as the discharging the Lords of Seffion, .or other Judges, to medle with any of ther priviledges; and the writer of it had not signed it on the back, as that A& requires it, tho that perquisit be not under the paine of nullity of the writ; but the certification is only deprivation of the wryter, &c. This was referred to a Committee. No. 700, p. 237.

2<sup>do</sup>. Robert Barclay of Ury, the Quaker, gave in a complaint to the Privy Counsell, against Mr. James Keith, writer, for intercepting a letter of his father, ordering a suspension to be exped of a charge given by the same Mr. James Keith. The Lords fand it, *contra jus gentium*, and gave Mr. James a reprimande for it; but no more.

3<sup>do</sup>. One Alexander Martin, notar in Duncce, is conveyened for uttering contumelious expreffions against the King's Privy Counsell; for one saying in his presence, "That he heard the trumpet, so the Counsell was ryfing," he wished they might never fit doune again: which words he indeavored to palliate and excufe as uttered only in sport.

4<sup>th</sup>. 14 *Januarij* 1682.—A Privy Counsell held upon the news of the

second excommunication used at Lanrick, and burning the A& of Parliament anent the Test ther. (See the Toune fyned, *infra* pag. 240.)

No. 701, 16 *Januarij* 1682.—The Proveft and Bailzies of Edinburgh, as Shireffs  
p. 238. within themselves (having called me as ther Affeffor, to fit with them, and affist them), doe judge Alex<sup>r</sup> Cowburne, ther hangman, or lockman, within 3 furs (the Earle of Errol as Conftable, nor his deputs entring no proteftation, on the pretence of its being a current Parliament), for murdering in his oune houle one of the licenced blew-goun beggars, called John Adamfon, alias Mackeinzie. The probation was flender, and moft of it by weemen; (which is not fo ufual, unleffe it be in fome excepted priviledged crimes, and that they be domeftick fervants: fee Mackeinzie's Criminalls, page 530;) and was only prefumptions againft him. Yet the Affife found him guilty, and referred his wife, Bessie Gall, to the Judges. The Bailzies caufed hang him in chains, betuen Leith and Edinburgh, on the 20 of Januar; for it feimes they are not bound to execute, but only to pronounce fentence within 3 furs after the deli& ; his wife they banifhed. (See my folio Hiftorick manufcript, page 30.)

No. 703, 18 *Januarij* 1682.—By A& of Privy Counfell, the Solemn League and  
p. 238. Covenant, with Cargil's Covenant, and fome other papers, ware this day folemely brunt at the Mercat Croffe of Edinburgh. The Magiftrats being prefent in ther fcarlet robes. Some wondred to fee ther policy in reviving the memory of fo old and buried a legend as the Solemne League was, (which was brunt in 1661 before;) and fet peeple now a-work to buy it, and read it. And for Cargil's ridiculous Covenant, they had, about a 12 moneth before this, caufed print it, tho that was only in contempt of it.

No. 707, § 2, 21 or 24 *Januarij* 1682.—His Royall Hynesse came to the Seffion, and  
p. 239. was prefent at the debate betuen the Chirurgians and Apothecaries.

No. 714, 31 *Januarij* 1682.—At Privy Counfell, the Parliament, which should  
p. 240. have met the 1 of March nixt, was adjourned to the 17 of April; and then from that afterwards, it was adjourned till the 15 of June, and

then to 28 of November ; and then on the 10 of October 1682 it was again, on his Majesty's Letter, adjourned till the 15 day of March 1683.

*Item*, The Privy Counsell writes up a Letter to the King, desiring that he may passe that signator of my Lord Argile's forfaultor, which was presented to him ; *de quo vide infra pag.* 252.

2 *Februarij* 1682.—At Privy Counsell, the Toune of Lanrick is fyned in 6000 mks, (not to be exacted of ther common good, which was scarce worth so much, but to be payed *per capita* by the inhabitants ; ) and that for not prosecuting and doing diligence to discover and apprehend these rebels, who came lately to ther mercat croce, and published ther Declaration against the King ; of which *supra pag.* 238. No. 716,  
p. 240.

*Item*, Ane Act made ordaining the country to carry corne and straw to the King's forces, and to furnish them in the place wher they quarter, or ly in garrison ; which forces the people to carry it to them, contrare to the late Act of Parliament in 1681, anent the supply : (*vide infra* 4<sup>th</sup> *Aprilis*, the Commissioners of Eist Lothian.) The Lord Montgomery and Laird of Skelmurly protested against the said Act, which gave great offence.

10 *Februarij* 1682.—At Privy Counsell, Mr. Arthur Ross, Archbishop of Glasgow, complains on the Masters and Regents of that University, that they had refused him his right of precedency of ther Chancellor, in electing of a Regent ; tho, in ther erection and foundation (see a litle of it in Mr. Middleton's Appendix to Spotswood's History, or the State of Scotland, page 206,) of the said Colledge, the Bishop is Chancellor, in so far as they relate to the statuts of Bononia in Italy, and by ther statuts and customis, a copie wheirof he produced, the Bishop was Chancellor and Præses. The Colledge alledged for themselves, that they had jurisdiction without the Bishop, *merum imperium et jus gladij*, to coerce crimes ; so that if homicide ware committed within their bounds, they could judge it even to death, as forraigne Universities might doe. (See *Pacius de privilegijs Universitatum Doctorum et Studioforum*, and other Lawyers on the same subject.) The Counsell found the Bishop's libell relevant, and admitted it to probation. No. 722,  
p. 241.

2<sup>do</sup>. *Eodem die*.—At Privy Counsell, Mr. Robert Martin, late criminall clerk, was staged for some malversations in that office, in suffering severall fanaticks for money to escape.

3<sup>do</sup>. A custome which we had got up this winter, of printing the Informations in debatable cases appointed for the Lords, was discharged by the Privy Counsell, to avoid reflections, that ware by Sir G. Lockhart and others insert therein. It was a pitty to prohibit so usefull a practise. It's common in France, wher they are called *factums*, because they containe the matter of fact.

No. 731, 16 *Februarij* 1682, *post meridiem*.—Queansberrie's patent to be ane p. 244. Marquis, was produced at Privy Counsell.

No. 742, 23 *Februarij* 1682.—Ramsay, Earle of Dalhousie, admitted a Privy p. 246. Counsellor, on a letter from his Majesty.

*Item*, a bill given in by one Hew Macgie, a mirror maker in the Canogate, representing, that by the practise and customes of other nations, any tradsman having 7 sones together, without the intervention of a daughter, are declared free of all publick burdens and taxes, and have other incouragements bestowed on them, for bringing up the saids children for the use and benefit of the commonwealth; and then subsumed in his bill, that he had 7 sons so borne, and therfor craved from his Royall Hynes and the Counsell the benefit of that priviledge. The Privy Counsell referred him to the Magistrats and Toune of Edinburgh, to be favorable to him in ther stents upon that account.

No. 743, 24 *Februarij* 1682.—One Harvie, a weaver, who had affixed and pro- p. 246. claimed the Bothuel Bridge declaration at Hamilton, in June 1679, was found guilty, at the Criminal Court, of rebellion, and was sentenced to be hanged for it, on the 3<sup>d</sup> of March nixt, at Lanrick, for exemple and terror to others ther; which was accordingly done, and thought hard, because he alledged he was forced to be ther drummer *vi majore*, and craved pardon; which does not agree with the offers ware made to fundry of the other men and weemen, who ware lately hanged before this, that if

they would only acknowledge the King's authority, ther life should be spared: but the difference lyes on this, all ther guilt confisted in a perverse and treasonable opinion, and had never acted any thing, nor been in armes, as this Harvy had been. Some thought the indemnity in 1679 should have saved him; but he was construed to be a ringleader. Yet severall of the witnesses deponed, that after the reading of that proclamation, he cryed, God save the King. Only it may be said, this was *protestatio contraria facto*.

28 *Februarij* 1682, being Tuesday, a Counsell was extraordinarily called, No. 745, to cognosce on the ryot committed Sunday last, in the kirk of Preston-<sup>p. 247.</sup> pans, by some of the common peeples, upon one Broun, who was ther schoolmaster, and (Buchan, ther oun minister, having refused the Test,) was set up to preach to them, by the Bischop; they pulled him out of the pulpit, and abused and affronted him. (*Vide infra* the 30 of March.)

*Primo Martij* 1682, &c.—This moneth of March is in place of our No. 746, Summer Session formerly. <sup>p. 247.</sup>

On the 6<sup>th</sup> of March 1681-2, the Duke of Albany shipped at Leith for No. 749, London. (See it *alibi*.) <sup>p. 247.</sup>

9 *Martij* 1682.—At Privy Counsell, John Broun of Nunlands, is No. 752, affoilzied from John Martin's pershuit, for having acted as bailzie of <sup>p. 248.</sup> the regality of under my Lord Nithsdale, his constituent, who had not tane the Test, feing he had taken it himselfe, and had a gift, *ad vitam et culpam*, from him of the place; he was also quarrelled for finding him guilty of the thift of some dozens of apples; tho we say, *de minimis non curat lex*, yet *justitia non confistit in quantitate*.

22 & 23 *Martij* 1682.—At Privy Counsell, some of the inhabitants of No. 762, the Toune of Peibles, have a complaint, one against another. <sup>p. 250.</sup>

At the Criminall Court, ther are mutuall pershuits betuen Forbes of Corfe, and Mowat of Bucquholly, for ryots and oppressions against one another.

No. 768, 24 *Martij* 1682.—The Parliament, by proclamation, at Privy Counsell,  
p. 252. is adjourned from April to the 17 of June nixt.

*Item*, The commiffion is paff, anent the dividing my Lord Argile's forfaultor, under his Majeftie's great feall.<sup>1</sup> By it ther is lands paying about yeirly 15,000 lb. Scots, allotted to his eldeft fone, including what he got already at his marriage theirin; lands paying 500 lb. fterling *per annum*, given to the younger children for ther portions. Then a commiffion to the Lords of Seffion, to laft till 1687, to rank the creditors of the Earle, with the creditors of the Marquis his father, (I think the debts due to Heriot's Hofpitall, and that at Stirling, fhould have a preference before others,) equally in the laft place: fo it's thought ther will be litle or nothing to give them, efpecially if the Maccleans get the Ile of Mull, MacNaughtan get back his land, and others their's. All the Jurifdi&ions, Patronages, Superiorities, Right of Generall Jufticiary, Tofterodarocho or Mairfhip, Chamberlanry, Lieutenandry, Mafter-houfholdfhip, Shireffhip, Crounery in thefe places, Conftabulary, &c., are annexed to the Croun, and ordained to be ratified in the nixt Parliament. If a reftitution of my Lord Argile fhall be at any time heirafter obtained, againft fo flender grounded a forfaultor, *per modum juftitiæ*, it would overthrow all this fabrick that Tarbet, Lord Register, and Haddo, Chancellor, and other of Argile's ennemies, hes made, and who, under borrowed names, hes got donatives and parcells of his eftate. (*Vide fupra* of his forfaultor, *pag.* 235.)

No. 782, On the occafion of Argile's forfaultor, it was regrated, that many  
p. 255. innocent perfones, the creditors, waffells, wife, children, and freinds of the traitor, by our cuftome, ware forfaulted and ruined.

No. 772, 27 *Martij* 1682.—At Criminall Court, the woman called Christian Fyffe,  
p. 253. (who had ftruck Mr. Alexander Ramsay, the minifter of Edinburgh,) was condemned to be hanged, on the 7 of Aprill nixt, for railing upon his Majefty, calling the King a villain, a knave, ane apoftat, perjured man,

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<sup>1</sup> (See a printed copie of the letters to the creditors, iffued furth theiron by the Lords of Seffion, which contains the fubftance of the faid commiffion.)



who deserved to be murdered, &c.: which shee would not retract, tho hir life was offered hir, if shee would do it. This was a wild delusion of Cameron's fowing; but the Privy Counsell, looking on hir as mad, reprived hir.

29 *March* 1682.—This day, at the Commiffion for Plantation of Kirks, the Duke of Hamilton (who had hitherto refused the Test, and so his Shireffships and Regalities were filled by the Privy Counsell,) did take the oath of the Test, and was allowed to doe it, tho the 1 of Januar, præfixed by the A& of Parliament for the taking theirow, was expired. No. 779,  
p. 254.

30 *Martij* 1682.—At Privy Counsell, Sir William Hamilton of Preston, Sir Alex<sup>r</sup> Morison of Prestongrange, and the other heritors of Prestongrange parish, are convened for the ryot, mentioned *supra* 28 *Februarij*, for suffering Broun, then preaching and praying, to be affronted by boyes, who touted hornes, &c. The Counsell fand the libell relevant against Prestongrange patron, and the other heritors, on ther former A& of Privy Counsell, because they ought to have been present, to have incouradged and protected the minifter; yet some of them had very rationall excuses of ther absence: (See them fined *infra* on the 27 of April.) No. 781,  
p. 254.

Sundry weemen in Temple parish are pershued, for affronting and injuring ther minifter; which libell was also admitted to probation.

This same Winter Sesssion, ther ware many other things debated and determined, which I have ather forgot, or omitted purposely, as, 1<sup>a</sup> That Mr. William Hog, Advocat, at last prevailed in his Declarator against Sir W<sup>m</sup> Ker, (*de quo supra*, pag. 65 & 118,) and the Lords reponed him again to the place he had in the Chancellary chamber. No. 782,  
p. 254.

2 *April* 1682, being Sunday, the Privy Counsell met after sermon, and red a letter from the King, discharging the Counsellors, to goe out of toune, and commanding such as ware absent to returne. This was to hinder Halton or others from coming up to London, as they intended, till his Royall Hynesse came back to them again, which would be within No. 783,  
p. 255.

three weeks, or theirby ; and, in the mean tyme, to continue and keep the dyets of Counsell.

No. 784,  
p. 255.

4 Aprilis 1682.—At Privy Counsell, Andrew Fletcher of Salton, and the other Commiffioners of the Ceffe and Excife for the fhire of Eift Lothian, are perfhued by the King's Advocat, for not meeting with the Shireff-depute, to fet prices on corne and ftrow, graffe and hay, for the fouldiers' horfes ; at leift for making a mock A&, in fetting doune prices, but not laying on the localities, wher the forces may be ferved with theffe neceffaries. Some heritors alledged they ware not advertifhed ; others, that 2 or 3 was a fufficient *quorum*, with the Shireff-depute, for that matter ; and that they could not locall it, without the wholle heritors. The Lords affoilzied the Shireff-depute, as having done his duety, but fand the indytment relevant againft the reft, and admitted it to probation ; instead wheirof, the Advocat referred it to ther oaths. (See the 3<sup>d</sup> A& of Parliament, anent the fupply, made in 1681 ; and the A& of Privy Counsell, anent corne and ftrow, enervating the faid A& of Parliament, dated the 3<sup>d</sup> of Februar 1682.) After much travell and paynes tane by the Counsell, on theffe Commiffioners of Eift Lothian, they at laft confented to name ftorehoufes and magazins in the moft convenient places of the fhire, whither the fojors might come and find corne, ftrow, and hay. The prices they modified then, ware a mark the threave of ftrow ; wheiras, becaufe of its fcarcity, the reft of the country were giving 20 pence for it. The Counsell durft not goe dire&ly counter to the forfaid A& of Parliament difcharging the forcing the tennents to carry ther ftrow, yet obliquely, they have altered it by ther faid A& of Counsell.

No. 785,  
p. 255.

*Eodem die.*—The ryot betuen James Grahame, merchand, and James Somervell, the uſher to the Exchequer, was called, and James Grahame fyned ; and tho the Bailzies of Edinburgh had judged him already, yet they did not regard it contrare to the 7 A& of Parliament in 1617, article 5 anent the Juftices of Peace ; in regard James Somervell, forfooth, was a member of the Exchequer.

13 & 20 *Aprilis* 1682.—James Aikenhead, apothecary in Edinburgh, is <sup>No. 786,</sup> <sup>p. 256.</sup> pershued before the Privy Counsell, for selling poisonous and amorous drogs and philters to provock lust, wheirby a woman had narrowly escaped with hir life, had not Do&tor Irving given hir ane antidot. The Counsell referred the tryall, and report theirof, to the Colledge of Physitians, as being *periti in arte* ; who thought such medicaments not safe to be given, without first taking ther ounse advife.

27 *April* 1682.—The case, *supra* page 254, anent Prestonpans kirk <sup>No. 787,</sup> <sup>p. 256.</sup> being advifed, the Lords of Privy Counsell fyne Sir W<sup>m</sup> Hamilton of Preston in 1800 mks., (who being present, stood by and laughed,) Prestongrange in 900 mks., and the rest of the heritors and portioners of Preston in 4000 mks. among them, for not obviating that disturbance. 800 mks. of this fyne was ordained to be payed to Brown the minifter, for the wrong then done him, and the rest to be given in to Sir W<sup>m</sup> Sharp, the cash-keeper ; tho it was alledged, he was not ther minifter, and that they had no acceffion to the ryot ; yet the Counsell proceedid on ther former Acts, ordaining the heritors to be liable for all dammages done to the minifter, tho that A& would only feime to mean ther proper minifter, and the refounding any damage or losse minifters shoud by robbery, &c., sustain in ther goods ; but not to extend to liquidate personall affronts, unlesse against such as might have hindred, and did it not.

*Eodem die*, and the following Counsell dayes, John Cheisley of Dalrey <sup>No. 788,</sup> <sup>p. 256.</sup> complains on Daveis, Clark, &c., who rode in the King's Life-guard, that they had, by way of hamesucken, invaded him in his oun house, and wounded and beat him and his servants, and had tane possession of his stables, and thrust out his oun horses, &c. They had also a recrimination against him, viz., that they being come to fetch his proportion of straw for ther horses, conforme to the late A& of Parliament and Counsell, he, with sundry of his servants and tennents, fell upon them with forks, grapes, &c., and had broken ther swords, and wounded some of them. It is referred to the Criminall Court. (See of it *infra* 6 of *Jully* 1682.

No. 789,  
p. 256.

6 *Maij* 1682.—Three trades prentifes in Edinburgh, are pannelled at the Criminall Court, for raising and fomenting, at leift for being accessory to the tumult and uproar, which happened againft the King's forces, in the Hy ftreet of Edinburgh, on the 3<sup>d</sup> of May laft. The Juftices fand naked prefence not relevant, but fand it fufficient to infer the pain of death againft them, if it ware proven they were prefent with armes or weapons drawn, or ufed any encouraging words to ftir up the rable to affault the fouldiers. The Affife found no acceffion proven, but only that they ware prefent; fo that they clenged them. The King's Advocat caufed them re-inclofe; they adhæred, at which he was very diffatified. (*Vide fupra*, the like cafe of one Lermont, page 20, and the Acts of Parliament ther againft tumults within Royal Burrows. See *infra* pag. 258, a guard impofed on Edinburgh. See my folio Hiftorique manuscript, marked G, pag. 34.)

6 *Maij*.—The fhipwrack at Limer Or; wher the Duke of York was in hazard of his life. See it at lenth in my folio Hiftorick manuscript.

No. 790,  
p. 256.

8 *Maij* 1682.—Sir George Gordon, Lord Haddo, (the Duke of York having arrived at Leith the night before,) from being Prefident of the Seffion, is advanced to be Chancelor of Scotland, in Rotheffe's place, to the difappointment of many, but cheifly of the Marquis of Atholl. The Marquis of Queansberry is made fole Hy Trefurer; the Commiffion of the Threfurie is revoked; and the Earle of Perth is made Lord Juftice-Generall, in Queansberrie's rounge; and at Privy Counfell, the Duke of Albany being prefent, ther pattents are red, and they admitted. The Chancelor's Commiffion referves the precedency in Exchequer to the Trefurer when he is prefent, (which was always debateable before;) and fome alledges ther is a warrant for the A. Bifchop of S<sup>t</sup> Androis to take the place of the Chancelor. A. Bifchop Sharp had fuch a letter, but never made ufe of it. (See more of this revolution in the forfaid Hiftorique Manuscript, and alfo in my 8<sup>th</sup> one of Seffion Affairs.)

No. 791,  
p. 256.

11 *Maij* 1682.—Duke Hamilton and the Earles of Tuedale and Midleton are, upon letters from the King, admitted on the Privy Coun-

fell ; the first 2 had been ther before, and ware turned out by Lauderdale's means.

2. *Item*, one Mitchell perfhues the Bailzie of the regality of Paisley, for ufing ane false protection, as if it had been subscribed by Patrick Meinzie, clerk to the Privy Counsell, which he disowned, it being contrary to the late A& of Parliament in 1681, discharging protections.

3. 12 *Maij* 1682.—Lieutenant General Drummond is admitted a Privy Counsellor.

4. And the Earle of Dumfermling hes 300 lb. sterling modified of the Earle of Callander, (*vide supra* thir parties, 25 March 1682,) for taking away the papers, and ay and whille the finall decifion of the plea be-tuixt them. Duke Hamilton debated long againft it ; but it being at last restricted to be for one year only, he yeelded.

5. *Item*, Drummond of Lundie is made Generall of the Artillery, and conjunct with Dalzeell, to officiat as Generall when he is absent, which Dalzeell took ill.

6. The Parliament is prorogued from the 15 of June, till the 28 of November nixt, 1682.

7. A Commiffion comes doune for trying the state of the coinage and Mint, againft Halton, to Duke Hamilton, Perth, Tuedale, Atholl, Southesk, the Chancelor, Register, Generall Major Drumond, Gordonston, Bailzie Baird, &c., all ennemies to Halton, Generall, and to Sir John Falconer, Master of the Mint. They proceeded, while Halton was yet at London, to take cognition, by the declarations upon oath of all the members and officers of the Mint ; and it's said, Sir John Falconer, in hopes to liberat himfelfe, at leift on promifes that it should extenuat his oune guilt, did goe great lenth to load Halton with mifdemeanors and malverfations, [1<sup>st</sup>] By inverting the King's part of the emoluments of the Scots Mint to his oune private gain. 2<sup>d</sup>. In making the fynesse below the standard. 3<sup>d</sup>. In coining 17,000 stoncs of copper money beyond the quantity contained in his Majestie's tuo warrands for the copper journeyes ;—all which struck as much, if not more, againft himfelfe, as Master, then againft Halton ; yet he presumed his opennesse and ingenuity would procure him

favor. When Halton came home from London, in the beginning of Jullie, they proceeded verie summarly with him ; they urged him to depone as the rest had done. He refused, seing no man is bound *jurare in propriam turpitudinem*, wher the case may be criminall, nor to accuse himselfe ; but he gave in a representation of the state of the Mint. They refused him a hearing, or a fight of the proceffe, or the testimonies of the rest, that he might know what they had deponed against him ; but craved he might give his *juramentum purgationis*, that he was free of these misapplications which the *sempierna probatio* loaded him with. Halton's objections against Sir John Falconer's deponing against him are, 1<sup>o</sup> *Inimicitia*. 2<sup>o</sup> He is *consciens criminiſque socius* ; (he is the fitter of this to discover.) 3<sup>o</sup> He depones to liberat and exoner himselfe. (See *Mascardus de probationibus*, and other lawyers.) 4<sup>o</sup> To elicit this deposition from him against Halton, ther ware promises of personall favors to himselfe ; which is the hyest degree of bribery and corruption. (*Vide infra* this affair of the Mint fully, page 290, *et seq.*) Then he gave in his defences, why he was not liable. 1<sup>o</sup> Because he had exonerations and discharges from his Majesty. 2<sup>o</sup> Because he was pardoned, and included in the generall A& of Indemnity past in 1679. This was refented as a declining of them ; and they repelled them *hoc loco*, seing they could not hinder them to inquire and proceed *per modum inquisitionis*. Then, being somewhat diffident of the King's Advocat, on the pretence he was sometymes out of toun, they adjoined Sir Patrick Home the advocat to him, who was a sworn enemy to Halton. This disatified the Advocat. They frame the report without allowing Halton any fight of it ; and sends Perth and the Register with it to London ; and, tho the Duke of York had promised to Halton that no determination should follow on it till he ware heard before his Majesty, yet a Scots Counsell is instantly called, who, on the reading of the said report of the Commiſſion, fly very hy, as they had been tuned, (Halton not being yet gone up,) and procures a letter from his Majesty, depriving him of all his places. (*De quo vide plura infra* 31 *August* 1682.) Halton, to prevent all hazard from the extremity of ther malice, formed ane ample remiſſion of Collonell Lockhart's and his brother, the Duke of Lauderdale's, exoneration ;

but the Duke of York said there was no present necessity for the passing of it by his Majesty. (See my 4<sup>th</sup> law manuscript, marked A. 7, page 40: see the 8<sup>th</sup> manuscript of Session occurments, *pag.* 70, *et seq.* *Item*, my folio Historick manuscript, page 38 and 41, and *infra* more of it, *pag.* 266.)

13 *Maij* 1682.—At Privy Counsell, Lermont, Macclellan of Barscob, <sup>No. 792,  
p. 258.</sup> one Fleming, and other prisoners, for being at Bothwell Bridge, are brought in; and, on their disowning of rebellious principles, the Duke declared he would intercede with his Majesty for pardons and remissions to them.

2. Gordon of Crachelay, (who was forefault for being in the late Rebellion, 1679,) came and gave in a petition to the Duke of York, imploring his clemency and mercy, and promising loyalty. He was received into favor.

3. Their is a bill given in by Fergusson of Kilkerran against the late President Dalrymple, for causing him be imprisoned at London. In regard the whole Lords of Session had owned what was done against him by a letter to the King, therefor the Privy Counsell referred this business to the Session.

4. The Towne of Edinburgh, because of the late uproar among them, of the 3<sup>d</sup> of May last, (*vide supra*, *pag.* 256,) are ordained by the Privy Counsell to levy and pay a company of 108 men, to serve for the Towne's constant guard on all emergencies, and the Duke to name the Captain and other officers. This was a clear breach of the liberties and privileges of the Town; yet the Magistrats were prevailed with, as to send up a petition to his Majesty, craving he would allow the same; which he did. So it was raised; and by ane Act of the Town Counsell in September last, the inhabitants are stented to pay them, some a groat, some 5 pence, and the hieft at 6 pence a week, for paying them. Patrick Grahame, Inchbraikie's sone, is captain of this Town-watch, and so has more power of the town then the Provost has. The Magistrats craved they might be the givers of the commissions; but tho this were granted, seeing the persons are named to them by others, and they are not Burgeses, nor of their own townsmen, it is still a great invasion. Ther is

no use now for the Toun's Trained Bands, or militia captains and companies, tho they be still kept up. The Duke would give a vast summe to have such a breach in London's walls; for it is, upon the matter, a surrender of ther Edinburgh militia over to him. The Trades of Edinburgh are exceedingly discontented with this concessiion of their Magistrats.

About this tyme ane A& of Privy Counsell was made, oblidging Shirefs and other magistrats, immediatly on the noife of any field conventicle, or rising, to dissipat them, or give notice of it to the Privy Counsell, or some Officer of State, at the rate of 3 mile for each hower after his knowledge; and if the advertisment come later, to be punisht as negligent. Duke Hamilton opposed this. (See him conveyned on this A&, in my folio manuscript A. 13, page 8<sup>t</sup>.)

No. 793,  
p. 258. 18 *Maij* 1682.—At Privy Counsell, (the Duke of York being parted for London on the 5 of May before,) upon a complaint given in by Ruthven of Gairne against Mr. W<sup>m</sup> Clerk, Advocat, bearing that he had hitherto kept up all his estate and papers, and therfor craving he might be desired to give up the papers, and restore him his rents. Tho this was civill, yet because of the long vacance, he being ane Advocat, who would decline inferior Courts, the Lords referred the count and reckning to the Session; but in the meantime modified 50 lb sterling to be payed yearly by Mr. W<sup>m</sup> to him during the dependance, (if Mr. W<sup>m</sup> should prolong it,) beginning the 1 terme's payment at Whitsonday coming. Mr. W<sup>m</sup> reclaimed much, offering instantly to count with him.

No. 794,  
p. 258. 19 *Maij* 1682.—One Gray is this day hanged at the Graffe Mercat, for disfouning the King's authority, and for adhæring to Gargill's Covenant and faction.

No. 795,  
p. 258. 22 *Maij* 1682.—The Privy Counsell confirmes the reestablishment of the Staple Port of the Netherlands at Camphire, back from Dort; and the Burrows elect one Mr. James Kennedy, formerly shiref-clerk of Aberdeen, to be ther Conservator in that part, in place of Harie Wilkie.



6 *Junij* 1682.—Johnston of Elchiefheills is pershued at Privy Counsell, <sup>No. 796,</sup> by his Ladie, (who is a daughter of Johnston of Lockerbies,) for ane <sup>p. 258.</sup> aliment, in regard shee could not safely cohabit with him, because of his cruelty in beating hir, and threatening to kill hir. The Lords fand the libell relevant, and admitted it to probation : and tho he had ane opulent estate, yet they only modified 300 mks. yearly to hir.

*Item*, The parishoners of the Path and kirk of Drone are pershued for affronting one Drummond, the new intrant minister, placed in rounge of Mr. Pitcairne, turned out : for while they ware instituting him, the rabble toor ther gounes, and threw stones at them. They are imprisoned and fyned.

*Eodem tempore*.—One Mr. Duncan, a minister in Perthshire, is con- <sup>No. 797,</sup> demned to death by the Earle of Perth, as steward of Creich [Creiff?], for <sup>p. 258.</sup> murdering ane infant, begotten by him in fornication on his oun servant maid, it being found buried under his hearth stone. He was convi& on very slender presumptions, which, however they might amount to degradation and banishment, yet it was thought hard to extend them to death.

*Eodem tempore*.—At Privy Counsell, tuo Conventicle ministers, called <sup>No. 798,</sup> [Henry] Erskin and [Patrick Warner] are banished the Kingdome, and <sup>p. 259.</sup> are ordained to find caution, and never to preach within Scotland, nor to returne.

*Item*, At Exchequer, ther being a new Tresurer Principall establisht, he, like a new byssom, fell on fundry methods to enrich the Tresurie.

1<sup>o</sup> His Majesty makes a new list of his pensions in Scotland, wher fundry are left out who had pensions formerly ; so this was a revocation and expunging of them upon the matter ; such as the Duke and Duchesse of Lauderdale's tuo pensions ; the Provest of Edinburgh's pension of 200 lb. sterling *per annum* ; and Doctor Stevinson's, of 1000 lb. Scots, &c. But other pensioners are brought in, in ther place ; so that it is only a commutation and circulation from one to another, viz. my Lady Errol, Lady Semple, Lady Largo, Earle of Traquaire, &c., all notorious Papists. Hence we may see who rules the Court, and who expects our preferments

and wealth. Next, the quota is not now 1000 lb. sterling less than it was formerly; for before this new modell, the whole pensions amounted a year to 25,500 lb. sterling, and now they are already (beside others who may be added) upwards of 24,000 lb. sterling; so there is no real, but only an imaginary ease of the Exchequer.

2<sup>do</sup>. His Majesty declares he will have no pension in time coming exceed 300 lb. sterling *per annum*, except these of the Officers of State; as the Chancellors, Secretaries, Presidents of the Council, &c., are each of them 1000 lb. sterling a year.

3<sup>th</sup>. That no gifts of recognition, or of other casualties of the superiority, shall be hereafter granted to creditors, or other donators; but that his Majesty shall exact his own dues, and have the profit of them, being as free to them as any other. Such a rigid advice as this was given to King James the 4<sup>th</sup>; but after trial, for gaining his people's love, he found it convenient to forbear it.

4<sup>th</sup>. Queensberry's commission is more ample than any formerly given; with power to him to choose the Clerks of Exchequer, (which the King did before, and then the Clerk Register,) and to preside there; and to examine Royall Burrows, and call them to account for their spending their common good, on the old Acts of Parliament, which is the power the Chamberlain Ainslie had before; and on the matter, it makes the Treasurer-depute and Lords of the Exchequer only his assistants, and no more.

5<sup>th</sup>. By the late Act of Exchequer, he requires, that all the valuation books in Scotland be brought in to him, that he may know their rents, and holdings, and reddendos, and when any waird waffels dyes, &c. (See the said printed Act.)

No. 799, *Eodem tempore, seu 9 Junij* 1682.—The Act against hunting, and constituting Masters of the Game, is renewed. (*Vide supra* the former Act of the 2 of March 1680, at page 142, against this same; but this new Act does not relate to it, farther than it calls and revokes it in the end of it, tho the 3 years therein mentioned were not yet expired. The designe of it may be, to put off Sir John Maitland, Earle of Hadinton, and some other of the Masters of the Game, put in by that first Act.)

28 *Junij* 1682.—The Bifchop of Edinburgh and Prefbytrie theirof, No. 800,  
 depofe Mr. Ninian Paterfon, minifter at Liberton, from his church, for p. 259.  
 fundry mifbehaviors; but mainly for having defamed his Bifchop in  
 feveral companies and occafions, as if he ware ane common adulterer.  
 And 4 *Julij* 1682, Mr. Ninian gives in a bill to the Privy Counfell  
 againft it, mentioning, he had appealed from the Bifchop and Prefbytrie  
 to the Synod, from it to the Arch-Bifchop of S<sup>t</sup> Androis, and, in caife  
 he faill and delay to doe juftice, then to his Majefty and his Counfell, by  
 vertue of his late ecclefiastick fupremacy in 1669; and that the Bifchop,  
 (tho he fhould not judge in *caufa propria*,) had proceeded *fpreta appella-*  
*tions*, and admitted fundry infamous and bribed witneffes againft him.  
 This bill by the Bifchop's prævalency was not red.

*Eodem* 4 *Julij* 1682.—Mr. James Hutchifon, minifter at Dundonald, in No. 801,  
 the Weft country, is conveyned at Privy Counfell, for debarring all who p. 259.  
 had tane the Teft, or late Bond, from the Lord's Table; and for breaking  
 his confinement within that parifh; and for baptifing the children of  
 others than his parifhoners. The libell being referred to his oath, he  
 declined to fwear, becaufe it was criminall. The Advocat reftricting it to  
 a pecuniarie or arbitrarie pain, conforme to the King's letter in 1673,  
 (fee *ſupra* Duntraith's caſe, pag. 205,) the Counfell fyned him in 5000  
 mks. Scots, and ſent him to priſon for his contumacy, holding him as  
 confeſt, and caſſed, revoked, and annulled the King's indulgence to  
 him, and diſcharged him to preach any more; which laſt censure  
 and interdict was fitter for a Church Judicator than a Civil. He was  
 innocent of the things libelled; yet for the preparative, he declined to  
 fwear; and it may [be] thought the cognition of theſe things *alterius*  
*fori*. He is known to be of very loyall principles. To fyne a poor  
 man like him, whoſe ſtock, it may be, exceeds not 6000 or 7000 mks.,  
 is equivalent and all one upon the matter, with the forfaulting of him,  
 which is very hard; for *pænæ debent eſſe proportionatæ delictis et*  
*commenſuratæ*.

5 *Julij* 1682.—The hail Lords of the Seſſion met, and my Lord New- No. 802,  
 p. 260.

ton's Letter from the King, making him President of the Session, was produced and read. He comes in place of Haddo, now Chancellor.

2. *Item*, Sir George Nicolson's of Kamnae his Letter to be a Lord in place of Newton was also read; and two Lords appointed to examine him and report; which they did, and he in the afternoon was sworn and received. Some doubted how this could be done, not being Session time; when the late Act of Sederunt, in 1674, ordains he should sit a week in the Utter House, &c. Some say the King's Letter expressly dispensed with this formality. We saw it in October and November 1681 past over and neglected, in the admission of Drumcarne and Boyne on the Session: only it may be said, they came in by virtue of a new Commission from the King to the whole Lords.

3. Pitmedden was made one of the Criminal Judges in place of Newton, and was this day received, and sworn by Perth, Justice-Generall.

4. The Lords had some federunts on their Commission anent Argyle's forfaultor and creditors, and took in some creditors' claims and testificats of their loyalties; but adjourned till August, and then to November 1682.

5. Pitmedden, being this week on the Bills, reported the case of an advocacy to the Lords, given in by the Town of Paisley against the Shireff of Renfrew, craving a generall advocacy of all actions should be pursued against any of their inhabitants before the Shireff Court; because they were expressly exempted by their charter in 1488, given them by King James the 4<sup>th</sup>, with all the privileges of the Burghs and Abbacies of Dumfermling, Newburgh, and Arbroath; (see a note of it *alibi*;) and they had a declarator of their exemption depending before the Lords. The Lords refused a generall advocacy, as unusual; but, when they should be pursued, ordained them to give in speciall advocations of each particular action, and the Lords would consider them. Yet I see a generall relaxation of all hornings *quoad* the effect of a service, granted to the Earle of Crawford, in Dury, 19 Junij 1630.

6. *Eodem die, post meridiem*.—At Privy Counsell, Gordon of Avachie pursues a ryot against

7. *Item*, another ryot is pursued by John Maister, portioner of Innerask, against Gordon, Viscount Kenmuir, for dispossessing him out of some

lands of Kenmuire's, which he had comprised. Alledged, the affair was wholly civil, and Kenmuire had a title to the possession; for he had acquired in a share and proportionall part of that same apprising.

6 *Julij* 1682.—John Cheisley *contra* Daveis and Clark. (*Vide supra* No. 802, p. 280. *this parties*, page 256, 27 *April* 1682.) The King's Advocat, at the Criminall Court, so far prævaricated, that he declared he passed from hamefucken, and insisted only for the invasion and oppression, contrare to the pershuar's inclination, and his oun advice formerly. They founded on a warrand they had from Murray, the Lientenant of the King's troupe, to come and force corne and straw, but *mandatum rei illicitæ non valet*. The Assise found them guilty. The one is banished the kingdoms, never to returne under the pain of death; and Clerk is degraded from the King's troupe, and ordained to find caution for his good behaviour in tyme coming. This is not enough to repress the souldiers' insolence; the punishment of hamefucken, (which they ware certainly guilty of,) is death. (See Sir G. Mackenzie's Criminalls, page 112.)

Before this tyme, Alexander Gartthoie, merchand in Edinburgh, having been affronted by one Mitchell, a baxter, he in revenge employed Muirhead of Lauchop, and some others, to fall upon him, and beat him, and break his armes and legs; this being discovered, Mitchell was about to have pershued him for assassination, and hyring men with money to so base an act. Gartthoie gave him 20 lb. sterling to passe from his pershuit. (See Carpzovius and others *de crimine assassinij*.)

8 *Julij* 1682.—Thomas Lermont, sone to Mr. Thomas, the Advocat, No. 804, kills Somervell younger of Drum, in a small quarell after drinking, and <sup>p. 261.</sup> that with young Hew Paterfone of Bannockburne's sword, and then he flees: he lived a day or 2 after, and forgave him, and bad him flee; and some alledged his wounds ware not mortall, but ware misguided. A præcognition was presently tane by the Criminall Court, what was Bannockburne's carriage in this affair; and witnesses ware examined, which was done by his father, to vindicat and clear him of any accession to it.

No. 805, 11 *Julij* 1682.—One Merry is condemned to be hanged, for a  
p. 261. slaughter committed by him about 6 years agoe. *Item*, one Walker is  
also sentenced for slaughter.

No. 806, *Eodem die*.—James Douglas, son to umquhile Mr. William Douglas, the  
p. 261. Advocat and Poet, having killed Lindsay, his step-brother, and  
son to Evelock, on whom James his mother was again married, he is  
brought to the Criminall Court, and ther, on probation *de corpore delicti*,  
he is found guilty by the Affise of the slaughter, and condemned to be  
headed at the Croffe of Edinburgh, on the 4 of August nixt.

After his condemnation, he having confessed that it was he who in  
winter last, in Januar, put fyre in Henry Grahame's wryteing chamber, at  
the Court of Guard in Edinburgh, out of revenge, and that he had first  
stollen some books their, (which he did out of revenge, tho it was soon  
quenched;) and the King's Advocat, and the Marquis of Douglas, who  
had some of James's means in his hands, considering if thir tuo, viz.,  
wilfull fyre-raising and thift in a landed man, ware proven against him,  
any one of them ware sufficient in law to forfault his estate, and take it  
from his 2 sisters, (he having about 36,000 mks. and more,) by the A&S of  
Parliament making thesse 2 crimes statutory treason; and that the  
Marquis, by Queanberrie's favor, might get the gift of his forfaultor  
from his Majesty, they obtained from the Privy Counsell a reprieve to  
him for some dayes, which the youth himselfe was very desirous of, giving  
them ground to imagine he would confesse it over again: wheirupon they  
gave him a new indytment of treason on the forsaide 2 grounds; but when  
he appeared on the 9<sup>th</sup> and tenth dayes of August, he was so taught, that all  
the pains the Earle of Perth, Justice-Generall, could take on him, could  
not extort a confession from him judicially in presence of the Affise, or  
that the former confession he had emitted in the Tolbuith, and signed, was  
his; for he would nather ounne it, nor deny it, but bad them prove it.  
The first thing his Advocats pled, was a delay, because he had raised ane  
exculpation on thir heads, 1<sup>st</sup> Of his minority, not being yet 19 years  
old: 2<sup>da</sup> of his frequent relapses unto melancoly and hypocondriack fits;  
which was to be execut at Perth, &c., and could not in so short a tyme be

returned. The Advocat answered, that no respect could be had to ther exculpation, seing it was not ready : 2<sup>da</sup>. it was null, a copie of it not having been given to him : 3<sup>da</sup>. the reasons of it ware not relevant ; for one after 14, as *doli capacissimus*, may be punished *pœna homicidij ordinaria* ; and melancoly fits is not enough, for no man will attempt to raise fyre without some degrees of fury and madnesse ; but thesse degrees will not excuse a *pœna*, unlesse it be a total *deliquium* and ecclipse of reason ; wheiras heir we find a long tract of reasoning and deliberation in him ere he perpetrat the fact. The Criminall Lords repelled the exculpation ; wheirin the Advocat said to me, in private, he thought them unjust. Then in *modum probationis* to the Affise, the K. Advocat produced his confession, signed by himselfe, and emitted in presence of the wholle number of the Justices, at leift of a *quorum*. Alledged, this was not a judicall confession, so as to clear and convince the Affise ; for by the 90 A& of the Parliament held in 1587, all probation should be led in presence of the Affise ; now the Affise did not see him subscribe these, nor hear him confesse it, they nather being then present nor sworne, theirfor it cannot be probative *quoad* them. The Criminall Lords fand it was a judicall confession ; but ware so cautious and circumspect, that nather did they suffer the Clerk to minut this interlocutor, but only pronounced it *viva voce* ; nor would they adde the words of a probative confession, (which would have determined all the ambiguity,) but only held it in the generall of a judicall confession ; which the King's Advocat thinking sufficient, he closes, and renunes farder probation, and repeets to the Affise the written confession, with the Lords' Interlocutor. The pannell's Advocats, viz., Sir David Thoirs, &c., 1<sup>o</sup>. take instruments, that all farder probation was renuned : 2<sup>da</sup>. for the mother, children, and freinds of the pannell, he protests, that whatever sentence, (tho of forfaitor,) should passe against him, yet it may not prejudice ther interests ; but that they, in a declarator upon his furiosity and other grounds, (of which a litle *infra*,) before the Session, may be reponed to his estate. Then he spoke to the Affise, that it was true the confession produced was in some sence judicall, as the Lords had found it, in so far as it was taken by them, and emitted by him, when they ware fitting in judgement ; but that was no-

wayes sufficient to satisfy the conscience of the Affisers, wheiron they might condemne the pannell; for it was not judicall *quoad* them, it nather being emitted nor adhered to in ther presence, so that they knew not if it was his subscription or no: and they ware to beleive no probation by forsaide 90 A&, but what they saw and heard from the pannell's oun mouth; and such a truth was this, that my Lord Advocat, in his printed Criminalls, *pag.* [258] pleads passionately for it, that a confession made to the Judges, but not to the Affise, ought not to be regarded, else it would confound the office of Judges, by making them witneses, &c. The King's Advocat finding he had mistaken himselfe, he raged and swore, and railed on Sir D. Thoires, and studied to irritate the Criminal Lords against him, as if he had harangued to reproach the Court and ther Interlocutor; and denyed that all probation neided to be in presence of the Affise, so as to be reiterated; and instanced wher one is perswaded for forging false writs, all that is produced to the Jury is only the Lords of Session's decreet of improbation, wheiron, without leading the witneses which ware the ground of that decreet, the Affise instantly find him guilty, tho ther be no more ther but the Clerk's assertion; and he threatned the Affisers with ane Affise of error, if they became like the seditious Ignoramus juries at London; and that he would infallibly prosecute them, and get them severly punished, as he had done lately with some clenging Assysers of Somervell of Urats, in 1681; and if ther wer any neid *ex superabundanti*, he would yet lead the Clerk of the Court, and his servant, John Anderfon, and the Lords on the bench as witneses, that they all heard the pannell confesse the fact, and saw him subscribe that paper; and it was yet tyme, seing in *criminalibus nunquam concluditur*; but that maxime is *nunquam contra reum*, and so in favors of the pannell, that his defences are receaveable at any tyme. If he had led that probation in due tyme, the Affise would have been rendred unexcuseable, and would have had no pretence wheiron to have clenged him. But this being omitted, when they inclose, (the most of them ware writers and merchands in Edinburgh,) they consider with themselves, that tho the evidences of the truth of his burning that chamber ware great, so that few doubted of its truth, yet seing he was to lay doune his life on another



account for his murder, (so he was not to escape,) and that all the designe here was a covetous inhanfing of his estate, and defrauding his poor sisters theirow; and that they, by the Advocat's oversight, had a latitude to find it not sufficiently proven to them, they, upon thir narrow grounds, doe by their verdict clenge and affoilzie him from the wholle contents of the libell of treason. The Advocat stormed and swore he should have them all imprifoned, (yet he never raised a summons of error against them,) and fyned, and declared infamous, and the nixt Affisers he should choife, should be Lithgow's fogers, to curb thir fanatiques: but thir transports of passion ware smiled at, and ware judged no great service to his Majestie's Governement. The Justices ordained the former sentence of death to be execute upon him for his murder, which was accordingly done on the of August 1682. (See his speach befyde me.)<sup>1</sup>

*Primo Augusti* 1682.—At Privy Counsell, Peter de Braweis pershues No. 807,  
Alex<sup>r</sup> Hunter, tackfman to the Toune of Edinburgh, as administrators p. 261.  
for Heriot's Hospitall, of ther Cannomilnes, on the water of Leith, for demolishing and spoiling a paper milne he had erected ther for his manufactory of playing cards, wheirow he had gotten the gift and patent from the Privy Counsell on the 20 of December 1681, (which I have seen,) prohibiting stri&ly the importation of any such carts, and allowing him, by a most exorbitant power, to sear&h and seize on them to his oune use; and also for throwing his wife in the dam, and using approbrious words. The libell was admitted to probation, and Hunter, (by the pershuar's moyen with the Lady Erroll and some Papists,) is fyned in 50 lb. sterling, and imprifoned, and ordained to find caution to indemnify the pershuar.

2, 3, 4, 5, 9, & 10 *dayes of August* 1682.—James Hamilton, and fundry No. 808,  
other Brewars in Edinburgh, give in a complaint to the Privy Counsell p. 263.  
against Sir John Young, Sir W<sup>m</sup> Binny, Sir James Dick, Ro<sup>t</sup> Milne of

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<sup>1</sup> [Fountainhall has here added, at some length, "The grounds of law, whereon, besydes his minority and furiosity, James Douglas might have been defended against this fyre-raising, which were omitted by his lawyers:" See his printed Decisions, vol. i. p. 188.]

Barneton, and Magnus Prince, bailzie of Edinburgh, tacksmen and partiners of the excise and imposition upon ale, within the Shires of Mid and Eist Lothian, and the Toune of Edinburgh, and the Commissioners of the Excise, setters of the said tack; alledging, the taxmen oppressed them, and to heir and see it found and declared, that it was illegally set, and procured by bribing my Lord Halton, one of the Commissioners setters of it, by giving him 14,000 mks., and by making Sir Ja. Dick, and M. Prince, then magistrats of Edinburgh, partenars in it, the said Sir James being also one of the Commissioners and Præsides, and therfor the tack should be declared null, (the Brewars having at the setting offered more advantageous conditions, which were refused,) because money was given by compact and collusion to get it set; and magistrats, contrare to ther duety, had fermed a part of the Toune's common good; and the tacksmen had extorted and overvalued the Brewars, in exacting 4 mks. per boll in the suburbs, and had not sworne ther surveyers, (as they ought to have done,) and had forced the Brewars to buy bear from them at exorbitant rates. It was alledged, a remuneration or gratuity, given long after a tack is sett, without any previous paction or promise to give it, was not bribery in law; and that magistrats being Brewars before they were elected, they were not bound to desert ther trade of brewing, but might have a share in the tack of the Excise as weell as any other burgesse. And the A&S of Burrows pretended to be against it ware not produced. (See the Informations in this cause.) The Lords of Secret Counsell found the Commissioners of Excise had power, by A& of Parliament, to manadge and regulate this part of his Majestie's revenue, the annuity of the Excise being 40,000 lb. sterling per annum, and for which *in subsidium* the Commissioners are personally liable, to the best advantage, by tacks or otherwayes as they please; tho the said [14<sup>th</sup>] A& of Parliament in 1661, speaks only of the lifting it by way of collection, and not setting it in tack; and tho they would be loath to quarrell a standing tack as this was, (tho they fand it was not such a tack and reall right as is mentioned in the 17 A& Parliament 6<sup>th</sup> James 2<sup>d</sup>, which speaks only of tacks of lands and of civill rights, not of tacks of the Excise of brewing,) cled with possession, nor yet discourage or limit the Commissioners of Excise in

manadging the King's rent. Yet upon the wholle matter; ther appeared to have been fraudulent and difingenuous methods used to obtain this tack to be fet to thir tacksmen; therfor superceiding to give answer to the relevancy, (the Privy Counsell use not to make A&ts before answer, but ordinarily præmits the probation, and confiders the wholle complex case at the advising the probation,) they ordained the pershuars to condescend in speciall on the qualifications of the particular fraud and deceit used by the taxmen or the Commiffioners, for obtaining the said tack of the Excise to themselves, or giving of any good deed for it, and what it was, and to adde it to ther libell, and to give it up to the defenders to see; which they accordingly did, and named Halton.

And offering to prove it by the oaths of the taxmen and others; it was objected, that they being the alledged givers of the bribe, ware *socij et participes criminis*, and tharfor not habile witnesses in law, as also, they were not given in in list with the double of the libell. The Lords being resolved to goe over any thing to reach and stain Halton, they also again, before answer, ordained them to be receaved, and they would consider ther validity at the advising, and allowed them to call any other witnesses they pleased for tryall their of, and appointed the Toune's gift, &c., to be produced to them, and named a committee; and in the mean tyme, that the payment of the King's annuity might not be retarded, nor the poor brewars oppressed, but rather encouradged in this Capitall city, and that this last tack hes not been fet with the cautions and limitations to the tacksmen contained in the former tacks, and that they had of late exacted 2 mks. per boll throw the suburbs, under pretence of his Majestie's gift, theror they ordained the present tacksmen to continue as tacksmen of the Excise and Imposition till the advising of the cause, and did take of and discharge any A&t or order formerly emitted by them, giving a stop to the uplifting of the Excise by quartering; providing that first the tacksmen find sufficient caution, acted in the books of Privy Counsell, that what Excise they should uplift theirafter, they should make it further command, as accords of the law; and discharged the tacksmen to uplift any more then a merk Scots for the Toune's imposition for each boll of malt brewed within the Toune's suburbs, and imported into the said Toune

of Edinburgh; and the Lords being carefull that untill the advifing of the caufe, the Brewars might have no juft ground of complaint upon the taxmen for exaction or unequall impofing of the Excife, they ordain the Commiffioners of the Excife, who, by A& of Parliament, are intrufted with the lifting theirow, to have frequent meetings, and to hear and determine upon any complaint made by the Brewars, or upon any difference that fhall happen to fall out betuixt them and the taxmen, and particularly ordaines the Commiffioners to caufe the tackfmen obferve the former accuftomed rules and methods prefcribed by the Commiffioners to the former tackfmen, before the tack was fet to the Brewars.

Then the Lords having confidered the probation anent that part of the taxmen's attempting to corrupt and bribe the Treafurer-Depute, for preferring them to the tack, and his accepting and receiveing the faid 14,000 mks. of bribe upon that account, they fand Sir John Young, Sir William Binnie, Sir James Dick, Magnus Prince, and Robert Milne, tackfmen and partners, ware guilty of attempting to corrupt and bribe the faid Treafurer-Depute as one of the Commiffioners, for procuring his favor to the fetting of the faid tack of the Excife, about the tyme of fetting it, or fome tyme theirafter, to get praference; for which bafe and unworthy contrivance, they decerned them all *in folidum* to make payment to Sir William Sharp, his Majeftie's Cafhkeeper, for his Majeftie's ufe, the forfaid fumme of 14,000 mks. Scots, defigned by them as a bribe to be given to Halton. And in regard the faids Sir William Binnie and Robert Milne's parts by the probation appeared to be hellifh and foull, and they prevaricated in ther depositions, and that they confeffe they receaved that fumme from the reft to be given as a bribe to the Treafurer-Depute, and that he refufed to accept of it, and yet they kepted it up, and concealed the fame, as if it had been receaved, and made the reft beleive that Halton had taken it, till after the intenting of this proces, and that they had in a high meafure abused and traduced the faid Treafurer-Depute in his name, honor, and reputation, being a Privy Counfeller and officer of State; theirfor the Secret Counfell, for ther personall cryme, fyned the faid Sir William Binny in 9,000 mks., and the faid Robert Milne, (whoffe houfe in Leith was burnt juft the night or

two before,) in 3,000 mks., and this over and above the forsaide summe of 14,000 mks., whereof they were to pay their shares; and allowed them releiff amongst themselves, *quoad* the said 14,000 mks. that is ordained to be escheat, confiscat, and brought in to his Majestie's treasure, but discharges all releiff of the other fynes imposed on them for their unfair dealing, and their owne personall cryme of a hy nature, to be brockers, fraudulent tamperers, and transactors with the taxmen to procure that bribe to Halton; and ordaines the saids wholle fynes to be payed in upon a charge of horning proceeding on 6 dayes: And superceids to give answer till the first Counsell day in November nixt, how far Sir James Dick and Magnus Prince have contraveened the laws in accepting an tack of any part of the comon good, being Magistrats the tyme of setting of the tack, and how far Sir James may be lyable in law, he not only being a magistrat, but also a commissioner, setter of the said tack; and if any of the burgeses should at that tyme complain of them, they would hear them, (which was a doun right invitation;) as also, 2<sup>da</sup> Superceeded till November the consideration of that other part of the libell and conclusion their of for restoring to the Brewars what they had unwarrantably exacted or extorted from them, allowing the Brewars in the mean tyme to give in to the committee named a particular condescendance of their severall exactions, whereof they crave repetition, that the Counsell may then consider their on; and ordained the tacksmen to exhibite their books, that it may appear what the bygone excrecence has been, and their profit over and above the quota of the King's Excise, and the saids Brewars pershuars to adduce probation, *prout de jure*, for proving their particular exactions; and 3<sup>da</sup> They reserved till then to consider if taxmen may exact 4 mks. per boll legally from the Brewars in the Potteraw, and West Port, &c., and ordained the committee, during the vacance, to take in the Brewars' clamours and complaints wher they had been extorted, by exacting more of them then was due.

And having advised the Tresurer-Depute's part, they doe not find it proven against him that he accepted of the said bribe offered to him, and therfor assoilzied him from the libell, and declared him quite and free their of in all tyme coming;—which some wondered at, and thought ther

might be bribery used by him to obtaine this absolutor; for it was well enough knowen he had taken the said bribe, but finding so strict a scrutiny to affront him, he gave it back after the proces, that they might have freedome on oath to say he had not taken it; like ane Irish Judge accused for a bribe, and it being proven it was left on his table, his defence was, it might be lying ther yet untouched by him, and accordingly he had conveyed and laid it on the same place, and it was found ther. But the Lords, in regard from the depositions, they find, that the pershuars had probable grounds for raising the said complaint, and for alledging the bribe was given, it having been offered, they doe not find the same calumnious, and therfor declare the pershuars are nowayes culpable upon that account, notwithstanding of this absolutor. If they tryed Halton's oath on this particular, it's like it would have discovered more.

No. 809,  
p. 266. *Eodem* 8, 9, & 10 *Augusti* 1682.—The Fleschers of Edinburgh are pershued before the Privy Counsell, by the King's Advocat and the landwart fleschers in the Land Markat, for breaking and contraveining the Privy Counsell's proclamation, and taking more then 4 pence for a pound of flesh. (See a note of the fleschers of Edinburgh's gifts, and fealls of causes, *alibi* besyde me.)

*Item*, James Douglas is pannelled at the Criminall Court for statutory treason, in raising fyre and stealing. (See the fate of this proces, *supra* pag. 261, *et seq.* )

*Item*, James Hamilton, Esquire, gives in a bill to the Privy Counsell against Mr. John Eleis of Eleifton, craving ane aliment of him, which was referred to the Clerk-Regifter. (See thir parties, *supra*.)

*Item*, Carmichaell of Balmedy pershues Mr. Charles Ged about a tutory.

No. 810,  
p. 266. 29 *Augusti* 1682.—Patrick Tailziefer, merchand in Edinburgh, pershues one John Geddy before the P. Counsell for a ryot committed on his tenants beside Falkland, in breaking up ther barnes, and taking away ther cornes. The Counsell, after probation led, ordaine Patrick to be repofessed, and fyne Geddy in a 100 mks. Scots.

31 *August* 1682.—His Majestie's letter was this day red, against my Lord Halton and the other officers of the Mint, (dated the 24 of August, that same day the Duke of Lauderdale dyed,) viz., Sir John Falconer, maister, John Falconer, and Alexander Maitland, warden, and counter warden, &c., bearing that he had considered the report of the Commission named by him to try the case of his Scots Mint, (*de quo supra*, 12 May 1682, *pag.* 257,) with the advise of his Scots Counsell at London, (who flew very hy against Halton on the reading, it being tuned up by the Duke of York, and the Earle of Perth, and the C[lerk] Register, who took up the said report,) and found they had malversed grosely in ther trufts, and therfor suspended and deprived them all, and put a stop to the coinage till farder order, and ordained his Advocat to insist against them, ather criminally or civilly, before the Consell, as he saw just: And now, since the King hes ordained them to be pershued before the Seffion, for restitution of what they had intrometted with more then they had warrand to coin, Halton, on the news of his brother the Duke's death, parted that same day for London that this sentence was intimat, and a committee named to goe and close up the Mint-house, and seall all. And thus fell that unhappie man, unregreted by many, because of his disoblidging infolence when in power; yet generally men when low meit with some commiseration and pittie, especially if they be estimat sufferers by such of whom they have deserved weel, and if the Duke of York may be called ungrate to him, see it debate in my folio Historique Manuscript, marked G, page 41, *et seq.*

*Eodem die.*—Captain Grahame of Claverhouse, having imprifoned some of Sir John Dalrymple's and his father's tennents in Galloway, for Conventicles and absence from the Church, Sir John presented a bill of suspension to the Privy Counsell, alledging, that he, as heritable baillie of the regality of Glenluce, within which they dwelt, had first attached and prevented Claverhouse, and fyned them; and so was præferable both in diligence and to the casualities and emoluments of the fyne; the A& [of] 1681 of the cumulative jurisdiction, not mentioning the fines to be the King's, but leiving them as they ware before that A&. Claverhouse

No. 811,  
p. 266.

No. 812,  
p. 267.

answered, that he, as having a Shireff's commiffion and power from the Privy Counsell, had first cited them, and Sir John's decreets ware but collusive, and not to be regarded. The Counsell ordained them to be set at liberty, they first configning ther fynes (which ware most exorbitant) in ther clerk's hands, and reserved the point of jurisdiction, and who had right to them, (they being under the quality of heritors,) till November, to be debate ; but, in the mean tyme, gave a chek and reprimande, that heritable Bailzies or Shireffs, who are negligent themselves in putting the laws to execution, should not offer to compete with the Shireffs commiffionat and put in by the Privy Counsell, who executed vigorously the King's laws. So that it is now evident, that what by these Counsell Shireffs, and what by the explications and extenfions of the late A& of Parliament in 1681, anent the King's cumulative jurisdiction, they designe to insignificat all the heritable offices in Scotland, such as regalities, bailzearies, &c. (See thir parties, *infra* 14 December 1682, *pag.* 280.)

No. 813, 28 & 29 *Septembris* 1682.—At Privy Counsell, Hew Wallace, brother  
 p. 267. to the late Justice-Clerk Craigie, who had prevailed with Major Biggar, to give a disposition of the lands and coall of Wolmet to the said Hew's sone, he taking on the name and armes of Biggar, he pershues before the Privy Counsell a ryot or violence committed by some at Wolmet, when he was going to take possession of the said estate, conforme to his disposition and infestment. The Lords imprisoned some of them, and ordained them to be scourged.

No. 814, 10 *Octobris* 1682.—This day, at Counsell, by a letter from his Majesty,  
 p. 267. the Parliament is adjourned from the 28 of November nixt, till the 15 of March 1683.

2<sup>da</sup> The Earle of Middleton's patent to be conjunct Secretary of Scotland with the Earle of Murray (see of this in my Historick Manuscript, *pag.* [40],) was red, and recorded in the books of Privy Counsell.

3<sup>ta</sup> Robert Andrew, upon confignation, hes a suspension of a decreet pronounced against him by the Shireff of Fyffe, fying him for absence from his parish kirk more then 3 Sundayes together.



## WINTER SESSION.

NOVEMBER 1682.

*Primo Novembris* 1682.—My Lord Chancellor Gordon produced his No. 815, patent of being Chancellor, and caused record it in the books of Sederunt; <sup>p. 269.</sup> and it being questioned, whither he neided take the Test for his place as Præses of the Session, it was thought unnecessar, seing he had taken the Test *qua* Chancelor already, in the Privy Counsell.

2. President Neuton proposed to the Lords, that for keiping ane æquable and steddý course in administrating of justice, that they might not be furcharged with throng in the end of the Session, that the Lords would punctually meet at 8 a cloak of the morning, and cited for him the 49 A& of Parliament in 1537, at the institution of the Colledge of Justice; and that they might meet in the afternoons for bills and concluded causes, and that thosse who came after the hower, should forfeit and pay halfe a dollar each tyme. The Lord Nairne and some others mutineered, and alledged that old A& of Parliament made against the President, for tho it ordaines the Lords to come in at 8 howers, yet they dissolved then at 11: so it was but 3 howers attendance, which they ware yet willing of; and ther was no law could oblide them to afternoons meetings; and to fyne them was like scooll boyes. It was agreed, the Lords should meet peremptorly at 9, and on the Wednesdayes afternoon, ther fitting no court then, save the Commiffion for Plantation of Kirks sometymes; and caused intimat to the parties and Advocats to attend them.

6 *Novembris* 1682.—At Criminall Court, Mr. Thomas Gordon, wryter No. 816 to the Signet, upon a gift from his Majesty, is receaved clerk to that <sup>p. 269.</sup> Court, notwithstanding Mr. Thomas Skeen, advocat, had a gift of that same office from Richard Maitland, Lord Justice-Clerk. (See the 8<sup>th</sup> Manuscript of Session Affairs, marked I. page 72, *vide supra*, pag. 226.)

No. 820, 7 *Novembris* 1682.—At Privy Counsell, his Majestie's letter was read anent the Officers of the Mint, (*vide supra*, pag. 266,) bearing, that, wher he had formerly ordered them to be pershued for ther malversations before the Privy Counsell, or Justice Court, now he had altered his purpose, and ordained his Treasurer and Advocat to insist against them before the Lords of Session; and, in regard John Falconer, late warden of the Mint, was omitted in the former order, and, yet, from the report, it appeared he was as guilty of malversations as the rest; therfor he ordained him also to be pershued with the rest.—*Nota*, This John Falconer, on the news of it, dyed suddenly of heart-break, at his house of Phefdo, tho some averred he hanged himselfe in his stable; upon which report, on the 24 of November 1682, the Treasurer caused put up the gift of his moveable escheat, as *felo de se*, and gifted it to Hugh Wallace, wryter, for his Majestie's behoof.

No. 822, 9 *Novembris* 1682.—Mr. William Moir, advocat, is admitted on the Register's presentation, one of the Clerks of Session. (See this fully in my 8<sup>o</sup> Manuscript of Session Occurrents at this day, pag. )

No. 823, *Eodem die*.—At Privy Counsell, Sir James Rothead of Innerleith, on a petition, representing he intended to inclose and impark some ground, in obedience to the 41<sup>st</sup> A& of Parliament in 1661, and other A&s, for haining and planting; and one Borthuick, his tennent, (who had a tack of the land,) opposed him, therfor they would authorise him. The Lords appointed a visitation to be made by some of ther number, to consider how it might be done to the leift prejudice to the tennent, ather by abating so much of his tack duety effeiring to his dammage and want, or else to give him as much and as convenient and good land elfewheir and adjacent, to compense it during the years yet to run of his tack. (*Vide supra* thir parties, pag. 56.)

2<sup>da</sup> Peter de Braweis pershues Sir James Dick and Thomas Young on this ground, that he had gotten from the Counsell the sole manufactory of making playing cards, and discharging the importing therfor after the 1 of April 1682, under the paine of seisure and confiscation theirow, and the A& gives him a most arbitrary and exorbitant power to search.—*Nota*,

No manufactories should be given but to Protestants, by the A& of Parliament, in 1669, anent incouradging strangers, and yet he is a Papist.— Wheirupon he charged them with generall letters, contrare to the A& of Sederunt in 1665, and they suspended on this reason, that they had not only commiffioned, but had even imported the cards before his gift took commencement. The Privy Counsell found he had no right to them; but leift it should wrong his manufa&ture, they ordained Sir James Dick, &c., ather to sell them to De Braweis, (who fought 2 pennies to affix his mark on every flock of them,) if they could aggree on a price, or to export them, or to keip them at home, and to sell none of them, under the paine of escheat, for a year or 2, till it might appear whither De Braweis will be able to furnish the country with that commoditie himselfe.

3<sup>da</sup> Sir Patrick Home, advocat, pershues Home of Linthill for a ryot, in demolishing a milne dam. Alledged, The milne was Linthill's, and he might doe with his oun what he pleased: 2<sup>da</sup> It was not a going milne. Replied, It was built on Sir Patrick's ground of Brouns-bank, *et inædificatum cedit solo*: And to the 2<sup>a</sup>, *Non refert*; it had not gone for 3 or 4 years, because he was in a proceffe evicting it from Sir Lawrence Scot. The Lords fand no deeds of violence libelled, and no actuall possession in Sir Patrick's person, it not having been a going milne for 3 years past, and therfor affoilzied from the ryot, and referred them to the Judge Ordinar for discuffing the civill point of right betuixt them, as accords of the law. (*Vide infra*, pag. 297.)<sup>1</sup>

13 *Novembris* 1682.—At Criminall Court, Mathew Hamilton in No. 825, Strathaven, as father, pershues John Leper, officer of the barony of Evandaill, and messenger ther, for wrongous apprehending and im-<sup>p. 271.</sup>

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<sup>1</sup> *Eodem tempore*.—In Murray of Brughton and Ker's case, *supra* pag. 135, the Lords having advised the probation, found Brughton, in June 1663, was not in Ireland, but by the Records of Parliament, being then a member, he was at Edinburgh, tho it was proven he was in Ireland in May 1663, and so fand his contumacy not purged, tho he was not then the nearest air of tailzie to Anandale, (a sister being alive,) but he was holden as confest, on other passive titles libelled, as vitious intromettor, &c., and so they decerned; but a 3<sup>d</sup> partie cannot use this as a probation against him.

prifoning of umquhile Andrew Hamilton his fone, and for his acceffion as art and part of his flaughter. Leper raifed ane exculpation on this ground, that he found him committing a ryot in the night tyme, being drunk, and that he, for fecuring the peace, carried him away to the caftle of Evandaill, to imprifon him their, and that he run up the ftair and ftepped in at a wrong door, wher ther was no lofting, and fo fell thorow to the lower ftory, and infortunatly brained himfelfe.<sup>1</sup> . . .

No. 826, 14 *Novembris* 1682.—This day, in the Seffion, was produced his Ma-  
p. 272. jeftie's letter, making John Wauchop of Edmifton a Lord, in place of Halton.

*Eodem die*.—At Privy Counfell, [Catherine] Rig, Lady Cavers (Douglas) is conveyned for refetting fugitive minifters, and for keeping conventicles, and for having a faft in hir houfe in July 1681, when Meldrum and Philiphauch ware debating at Privy Counfell, that Philiphauch might prevail; and the libell being referred to hir oath, and thee refufing to depone, they fyned hir in 9,000 mks., (which is neir 3 years of hir joyn- ture,) and imprifoned hir in Stirling Caftle during their pleafure.

*Item*, Complaints being exhibited againft Camron of Lochyell, and fome of his Clan, for forning and robbing, and for deforcing, and doing violence and affronts to a part of the King's forces, who came ther to lift the cefle and taxation; the Lords ordained them to be prefently difarmed of ther fwords, piftolls, and fkein-durks, and to be fecurly imprifoned. (*Vide infra* more, the 30 of November.)

No. 828, 16 *Novembris* 1682.—At the Privy Counfell, the Brewars and Tackf-  
p. 273. men (*de quo fupra*, pag. 263, *et feq.*) being reported, the Lords fand the tackfmen had done nothing but what was warrantable, in exa&ing of 4 mks. per boll within the toun for excife and imppofition, notwithstanding ther gift was only 2 pennies per pint, and that in refpect of the Lords of Seffion's decreet, (*fupra* in Januar 1681, pag. 177,) and decerned the brewars to continue to pay the fame; but in the fuburbs,

<sup>1</sup> [For the remainder of this case, see Fountainhall's Decisions, vol. i. p. 194.]

during the dependence, allowed the tacksmen only to exact 3 mks. per boll.

2<sup>da</sup> A bill is given in by Blair of Glaschin, complaining that he and his wife having been charged with lawborrows, and he not having suspended nor found caution, they had maliciously taken his wife with caption, and imprisoned hir, which was *mali exempli*, shee being *sub potestate viri*, and not able to act for hirselve. The Lords of Secret Counsell ordained hir to be set at liberty. Yet Stairs, in his Institutions, Tit. "Conjugall Obligations," page 35 and 36, *in principio*, and my folio law manuscript D, at the 8 of Januarie 1679, page 38, Selkirk and Alifon, shew cases whair married wives, *ex proprio delicto*, may be charged with lawborrows.

3<sup>ta</sup> *Eodem die*.—Carnegie of Cockstoun pershues the Clerk of Brichen, 1<sup>a</sup> As not having taken the Test, tho it be a Royall Burgh, and so he is comprehended within the Act of Parliament anent the Test. 2<sup>da</sup> For contumelious and approbrious language.

4<sup>ta</sup> The Archbishop, and some of the Magistrats of Glasgow, pershue the Deacon Conveener and some of the Trades, for factious behaviour at ther last election, and suffering them to choose a Deacon Conveener without first taking the Test, (tho they were dispensed with at the liting and electing at Michelmasse 1681, because the Act was new made.) The Privy Counsell dismissed them on a reprimand. (*Vide infra* 30 *Novembris*.)

5<sup>ta</sup> Ther is a complaint given in by the Magistrats of the Toune of Dundee against gentlemen, for disturbing the peace of ther Toune, in affronting the watch, and breaking ther drummer's drum, &c.

17 *Novembris* 1682.—At Exchequer, one Creighton seeking to No. 830, passe a remission under his Majestie's hand to him for a slaughter, casually P. 273. committed by him 18 years ago, upon one called Gregorie, the same was violently opposed by the defunct's freinds, in regard it appeared, by the probation tane in the præcognition, he was too instrumentall in it; however, (tho we have not the vicenniall prescription with us, yet) the lenth of tyme since it was perpetrated, may serve to expiat and obliterate the crime in some measure.—This remission was at last past and exped.

*Item*, The Earle of Erroll having resigned his office of Shireffship of Aberdeenshire, in favors of my Lord Haddo, Chancellor, he gets this day past a pension of 100 lb. sterling yearly, in lieu their of.

No. 833, 23 *Novembris* 1682.—The Lords of Session make ane A& of Sederunt  
p. 274. against servants in their clerk's chambers, that they be not agents in any processes upon which they write, because it did occasion many calumnies, and falsehoods, and abstracting of papers, to the heavy prejudice of the other party, against whom they were taken up and employed.

No. 834, *Eodem die*.—At Privy Counsell, William Loury elder of Blackwood,  
p. 274. late Chamberlain to the Marquis of Douglas, and reputed a bad instrument between him and his Lady in their differences, is imprisoned for harboring and resetting fugitive ministers, and conversing with rebels who had been at Bothwell-bridge, and other intercommoned persons, and receiving mail and duty from them. He was referred to the Criminal Court, to be persuaded ther by his Majesty's Advocate for these treasonable deeds. (*Vide* more of him *infra* pag. 297, *et seq.* 31 *Januar* 1683.)

No. 835, 24 *Novembris* 1682.—The *Patience* and *Palme-Tree* ships (*de quo*  
p. 274. *supra* pag. 242,) was this day advised and decided against the *Capers* in favors of the strangers, and finding them to be free ships, and so reducing the Admirall's decreets, which had adjudged them *pryfe*. (See the printed processes anent their ships besyde me. *Vide infra* 14 *Februar*, their parties.) The refusing to shew their documents or passes to the *Capers* or privateers is a great presumption of ane ennemie's ship, and that it's unclear; yet it's no probation, for ships may be unwilling to shew their passes, for fear privateers may destroy them; yet it's a ground to bring them up, and to foilzie the privateer from damages and expences for so doing; but it is not a sufficient ground whereupon these ships can be adjudged.—The 2 new entered Lords, *Kemnay* and *Edmiston*, declined to vote in this cause, because it was debate before their time of admission. It was resented, and tane notice of, that *Salin*, then Ordinar in the Utter House, being clear for the *Capers*, did, contrary to

the Lords A&ts, stay within and vote, and got Harcous, (who declined himselfe, because his wife was niece to Proveft Binney, one of the Capers concerned,) to goe out and sit for him that fornoon.—A letter from the King, in favors of the Capers, being founded on, the Chancelor (who was againft them,) told it was but *rescriptum obrepticium*, yet in other cafes he will [be] offended at any who shall neglect the King's letters ; he takes that liberty to himselfe which he will not allow to others.

24 *Novembris* 1682.—John Falconer of Fefdo's efcheat gifted at No. 836,  
Exchequer. (*Vide supra* 7 *Novembris*.) p. 275.

*Eodem die*.—At the Criminal Court, one Woodburne is pannelled for being at the rebellion of Bothuel-bridge. Alledged, He had taken the benefit of his Majestie's proclamation of indemnity and pardon to all who would subscribe the bond never again to rise in armes against his Majesty, which he had *debito tempore* signed, and so was free. Answered, The subscription of his name at that bond, produced as tane by the Earle of Carnwath, having power ther, was not his ; but ther was a nottar who had affixed near the names of 100 persons to the said bond, as if it had been ther oune subscriptions, and he had this Woodburne's with the rest ; and by this pious fraud, he had brought of and saved many of them ; tho he was not commissiionat to signe for them. Woodburne offered to abide at the truth of the subscription as his. The King's Advocat offered to improve it as false ; so that heir *quæstio falsi* became *incidenter* prejudiciall, and behooved to goe before the tryall of the cryme of treason, libelled *principaliter*. It seemed od and new, to offer to improve that as false which a man abode at as truly subscriyved by him ; yet a writ may be proven false against one, *quoad datam*, wher one clames benefit by it. Ther ware pregnant presumptions against Woodburne ; for his present subscription differed *toto cælo* from that other. Yet, in a short tyme, a man's hand wryt may alter much.

*Eodem die*.—James Alston, merchand in Edinburgh, against Sir James No. 837,  
Stamfeild and Philip his sone, for 1100 lb. Scots of cloaths tane off by p. 274.  
himselfe and his wife in 2 years tyme. The ground he insisted on against

Sir James, the father, was, becaufe tho the son was major and married the tyme of the furnishing, yet he and his lady ware *in familia* with Sir James, and the son had no estat aliunde to be affected, and so the father was bound to cloath and aliment them. The Lords, on Forret's report, decerned against Philip, but affoizied the father, becaufe he made it appear that he had payed 5000 mks. of debts for his son, contracted by him during that very space, and that his sone was a prodigall master. Tho we have not amongs us the *senatus consultum Macedonianum*, prohibiting the lending of money to sones *in familia*.

No. 838, 28 *Novembris* 1682.—Sir James Stamfield of Newmilnes, *contra* the Earle of Middleton, now one of the Secretaries, reported also by Forret. The Lords fand it no passive title on Middleton, to cause him pay his father's debt, that he had granted a factory to William Coupar, his father's old chamberlain, to uplift the rents; and that 2 years after his father's death, he had counted with him, and given him a discharge; which they found no gestion; becaufe he stood infeft in some lands before Sir James's debt, and the factory was general, without condescending, and so might be applyed to thesse lands; and that he had a right to intromet from his mother-in-law, who was liferentrix of the lands, and stood infeft in 10,000 lb. sterling for the behooff of hir children: which ware sufficient to palliat, cloath, and purge his intromissions, and make him only countable to hir.—It was talked, he would not have got so favorable ane Interlocutor before he became a courtier.

No. 839, 29 *Novembris* 1682.—In the case of Lundy and Trotter, (*de quo supra* pag. 203,) the Lords demurred to annull ane Inhibition which wanted the 3 Oyessees, but boor lawfull publication; which imports it was red; seing it was offered to be proven by the witnessees insert, that the 3 Oyessees ware truely adhibit:—but this being wanting as it stands registrat, it ware very dangerous to dispense with it; and to admit such a supplementall probation, ware to render registers superfluous: for one may buy notwithstanding of ane Inhibition, if I see it hes nullities by the looking it in the Register. This case was to-day voted, and their being 16 Lords, Or-



dinar and Extraordinary within, (besyde the Chancellor and the Lords in the Utter House, and 2 absent,) they were equally divided, 8 against 8 : so it came to the Chancellor's casting vote, (which happens not oft,) and he craved tyme to deliberat and think upon it as a leading important case. Ther ware nyne score of Inhibitions produced which had the same want and defect, so that if it were annulled, all thesse diligences would fall *in consequentiam* ; as this is ane argument *ab incommodo*, so we see as great inconveniences on the other hand to dispense with thesse ancient solemnities, (for the *Hoefum* is from the Norman law,) or to prove them *ex intervallo*, tho they signify nothing in themselves, nor tend in the least to certiorat the lidges. *Quid juris* if the Chancellor decline to give his suffrage ? *An in pari casu reus est absolvendus, ut actus valeat*, or are they to be forced to agree ?

29 *Novembris* 1682.—Sir Andrew Dick against Mr. Robert Deans, No. 841, both advocats ; ane advocacy from the Comisars of Edinburgh, wher p. 276.  
Sir A. Dick pershued Mr. Robert for flandering him by stealing away and murdering his good name and reputation, (for in law *vita et fama æquiparantur et pari passu ambulant*,) by calling him a belted, *id est*, in one sence a whipped, knight, for stealling some Scots records out of the Tour of London, the tyme of Oliver's usurpation. Mr. Robert's reasons of advocacy ware, 1<sup>o</sup> He was a member of the Session. 2<sup>do</sup> The Comisars had committed iniquity in sustaining proces after he had debarred Sir A. with horning. Answered, The first was a declinator, and was not competent now after he had proponed peremptors. *Item*, The priviledge of advocats was only in civill cases, but not in flanders, wher the Comisars as *judices Christianitatis* ware only competent *in prima instantia* privative of the Lords, ay till they had pronounced sentence, by imposing a fyne and the usuall censure of standing at the Church door and recanting. To the 2<sup>d</sup>, The Comisars did no wrong, for tho they repelled Sir A. *ab agendo*, yet *ne delicta maneat impunita*, they sustained proces, *ad interesse publicum*, at ther Proctor-Fiscall's instance. The Lords heard the two parties scold a whylle upon one another in ther oun preference for ther diversion.

No. 843,  
p. 277. 30 *Novembris* 1682.—At Privy Counsell, the Laird of Lochyell, (*de quo supra* 272, *et seq.*) is fyned, as the head of that Clan, in 100 lb. sterling, for the deforcement and violence offered by his men to the King's forces, when they came there to exact the taxations; and 3 of them are referred to the Criminall Court, to be pershued for ther lives, as guilty of treason, for opposing the King's authority. The Clerk-Register became caution for Lochyell. This was done (as was thought) to cause him give way to Huntlye's getting a footing in Lochaber.

2<sup>do</sup>. The Magistrats of Edinburgh are called for, and commanded to give in ane exact list of all the inhabitants that are in ther toun, or have lately tane shelter ther from the country, to shun the pœnall laws against ther bygane going to conventicles, and absence from ther parish churches; and the Privy Counsell threatned to bring in to Edinburgh the Laird of Meldrum, with his troupe, he being now Captain, on the Earle of Airleye's dimission, (who hes got a pension for it,) who would vigorously execute thesse laws.

3<sup>tho</sup>. Nisbet and Hall, the two Bailzies of Glasgow, (*vide supra pag.* 273,) upon a new proces raised against them, are severly reproved for ther carriage at the last election; and ther sentence is superceeded till ther carriage be seen in the new one, and ther Counsell is ordained to choise a new Deacon Conveiner.

No. 844,  
p. 277. 1 *Decembris* 1682.—At Exchequer, the liferent escheats of all thosse ministers who had preached after the 1 of November 1681, without taking the Test, is gifted to Hew Wallace, cash-keeper.

No. 848,  
p. 278. 7 *Decembris* 1682.—At Privy Counsell, ther was another pretty witty cheat pershued against one Carmichell, and Mr. William Cheifley the wryter, by one Muir. The case was; one Daniell Muir, on his deathbed, was perswaded to dispone his lands of Gladstones, in prejudice of his righteous air then abroad, to one Carmichell; but, because he could not goe to kirk and mercat to validat the deed, they hyre and busk up a fellow to personat the sick disponer, and buckles a chin-cloath and a cap to him, to disguise him; yet the nottar and witneses doubting he was the

fick man, he affirmed to them he was he ; and so instruments are tane on his being at kirk and merkat. The air returning at laft home, Carmichell, to secure himfelfe, offers him fome money, for a ratification ; but he getting fome notice of the cheat and falfehood, hes raifed a complaint theiron ; and befydes Mr. William Cheifleye's acceffion, ther was alfo notice taken by the Counfell of his drawing of papers, tho he hes not tane the Teft, fo that his efcheat falls by the A& of Parliament in 1681 ; but he hes tane it fince. The A& of Grace, in March 1674, was founded on as a pardon and difcharge of this cheat prior theirto ; but the Lords referved the confideration of that, to the conclufion of the caufe. The wholle Counfell abhorred the villany, and ware ready to fwear the witneffes for proving it, and to name a committee for examining them. But Muir the perfhuar, throw the gout, not being perfonally prefent at the bar, the Chancelor ftopped farder procedor, till he fhould be prefent the nixt day : which was a ftri& and rigorous adhæring to forme.

2<sup>da</sup> On the libell and reconvention perfhued, at Privy Counfell, by Archibald Home, tennent in Dalry milnes, againft John Cheifley of Dalry ; the Lords found, after the cornes are in, one cannot poind other men's goods for being on ther stubble, even tho it be within inclofures, feing the ditches fhould be fo fenfible as beafts may not win over them ; but that you may only drive them off ; (yet fee the 41 A& anent planting in 1661,) and theirfor Dalry, having driven the faids Archbald's flock of fheep throw other men's lands, wheirby they had wandred, they ordained him to pay 4 lb. Scots, as the price of each head of them that Archibald fhould fwear he wanted, as if it had been a fpulzie.<sup>1</sup>

3<sup>da</sup> Alexander Mylne, Proveft, and the other Magiftrats of the Toune of Lithgow, gave in to the Counfell a libell and accusation againft Mr. Alexander Seton ther minifter, for feverall imprudences, infolences to the Magiftrats and peeple, and malverfations with the poor's box, wheirby his miniftry was rendered odious and unprofitable their. Much pick on both fydes feimed to be mingled in this affair. It was referred to the Archbifchop of St. Andrews and the Bifchop of Edinburgh, which laft aymed

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<sup>1</sup> Yet see the 41 Act of Parliament in 1661, wher inclofures are to be kept at all tymes.

to have him transported elfewher, on some privat designe to fill that place with another.

4<sup>th</sup> Ther are mutuall libells, at Counsell, betwen Captain Samuel Lockhart, brother to Cleghorne, and one Wilky, Comissar of Lanrick, accusing each other of favoring the rebells. It was proven against Wilky, when the 40 horsemen came to Lanrick Croffe, and proclaimed the King a Tyrant, he hindred some, who ware moving that the Toune should rise to apprehend them ; and mockingly said, " Let them be doing ther, we are not concerned to trouble them ; let them that gets the King's pay, fight them." Wheiron the Counsell sent him to prifon, and ordained him to be pershued criminally, togither with Blaikwood. It was alledged by Wilky against Samuel, that a company of the rebells having met him at ane ale-houfe on the road, he drank with them, and wished them good successe ; and promised to follow them : which he said he meerly did to save his life, at leift that he might not be taken prifoner. The Counsell appointed the witnesses to be admitted against him ; but in regard of his knowen loyalty, (or rather his relation to the Chancelor's lady,) he, upon his finding caution for his appearance, under the payne of 500 lb. sterling, was left to his oune freedome in the mean tyme, during the dependance and tryall.

No. 850, 11 *Decembris* 1682.—At Criminall Court, 3 Bothuel-bridge rebells, p. 279. called Cochrane, Finlay, and Robertfon, are pannelled for being ther, at leift for difouning the King's authority, and calling him a Tyrant, and refusing to call Bothuel-bridge a rebellion. They ware sentenced to be hanged on the 15 of December. Robertfon said boldly to the King's Advocat, that he was maintaining no more then what he had fworne to in the Teft ; for by it, they had all sworn to Knox's old Confession of Faith, and fo by the [24<sup>th</sup>] article of it, ware bound to fuppreffe tyranny as weell as he.

No. 852, 13 *Decembris* 1682.—At the Criminall Court, the Lords, in the cafe of p. 280. Cairnes, Ferguffon, &c., found, that the refetting of traitors and rebells, tho it be his oune fone, (but I think this fould not extend to man and

wife's mutuall refetting one another, tho rebell,) if they be ather declared forfault traitors, or denounced fugitive, or intercommoned, or holden and repute notorious knowen rebells, (tho it should not be proven against you that you knew them to be fuch,) the publick notoriety being proven by witneses, (for heir *scire et scire debere æquiparantur*, and he is *in dolo qui id ignorat quod omnes sciunt*;) they found, that fuch harboring, refetting, and converfing, was treason, and this guilt was punisheable with the paine of treason; becaufe the 14, 15, and 25 A&s of Parliament in 1449, and 97 in 1540, exprefly declares fuch liable as traitors, and requires no more but that they be holden and repute fuch. This was determined, against the opinion of Pitmedden and Harcous, 2 of the Justices, with an eye to make a preparative in thir poor men's cafe, to reach Blaikwood, and many others. For, by this ftrange Interlocutor may be indangered many innocent peeple, efpecially almoft all the Westren fhires, wher fuch promifcuous converfe hes been frequent, and near inevitable; and it can be only juft to make this fo odious a crime, where I voluntarily, wittingly, and willingly, without compulfion, converfe with one I know to be a rebell, whither he be declared or not, or at leift, that he is nottorly knowen to be one in that part of the country wher I ftay; for they may be nottor in one part, and yet not in that place wher I dwell. And therfor, to mitigat it, the Judges declared, they meant not, by refetting, ane accidental rencounter in ane innes, or on the hie road, but a deliberat concealling them from the law, or affifting and maintaining them with meat, drink, and harbory, and keeping them as domesticks or fervants, without informing our felves anent ther condition; for, if the 4 A& of Parliament in 1681, require, for putting me *in mala fide*, that the very non-conformifts, fanatick tennents, living upon my ground, fhall be intimat to me, for turning them away; then, *multo magis*, will law and reason require my knowledge of thofe who live elfewheir, or skulk and lurk a fhort while in my land, to be rebells, ere I can be concludit guilty of treasonable refett of them. And it may be alledged, that the forfaid 15 A& of Parliament in 1449, as too fevere, is in defuetude. (See A& 98 in 1487, and A& 144 in 1592; fee Blaikwood's cafe, *infra* pag. 297, *et feqq.*)

No. 853,  
p. 280.

14 *Decembris* 1682.—At Privy Counsell, Captain John Grahame of Claverhouse his bill of complaint against Sir John Dalrymple, advocat, was red. (*Vide supra pag.* 267, *et infra* more of thir parties, 21 *Decembris*, 6 *Januar*, *et* 12 *Februar* 1683.) It boor, that Sir John Dalrymple had weakned the hands of the Governement, in the shire of Galloway, in traversing and opposing the commission the King's Counsell had given to Claveris, containing a power, both civill, criminall, and military, of Shireffship and Justiciary, of executing the Church laws against conventicles, withdrawing from the kirk, unlawfull baptismes, &c., under the pretence of his præferable jurisdiction, as heretable bailzie of the regality of Glenluffe; and that he studied to stir up the peeple to a dislyke of the King's forces their; which projects, designs, and methods, ware the very same with thesse set on foot against Sir James Turner and Sir William Bannatyne, in 1666, when they rose and came to Pentland-hills in armes, and have a naturall tendency to sedition, and infilling rebellion; that he kepted disloyall and disaffected persons to be his bailzies and clerks to that his regality, and did not administer the Test to them til long after Januar 1682, contrare to the A& of Parliament; and he imposed mock fynes on delinquents, not the 50 or 60 part of what the law appointed, only to prevent Claveris fynes; and that he and his father offered him a bribe of 150 lb. sterling out of ther fynes, to connive at the irregularities of his mother the Lady Stairs, hir sisters, and others; and did insolently laugh at the proclamation of a Court, made and intimat by Claveris, and discharged his tennents to be present; and at the head Court he produced a factious instrument against him, as if he had exacted free quarters; and did convocat, consult, and combyne with some gentlemen ther, anent matters of State, contrare to his oath of the Test, wheirby he had incurred the cryme of perjury; and had depraved and misinterpreted the King's law in 1681, anent free quarters, as if the peeple ware not bound to furnish corne and straw to the souldiers at all; and so had indeavored to creat discord and jealousy betuen the King and his subjects, wheirby he had committed the cryme, and merited the punishment, of leasing-making; and that he had traduced and defamed Claveris to the Privy Counsellers, as a contraveiner of the said law against free quarters, and as one who

had usurped and assumed the King's incommunicable prerogative, in remitting and discharging, at his own hand, Hay of Park, and others, for treason, and other crimes beyond his commission; and had misrepresented him, as one who had cheated the King's Treasury, in exacting the fines of heritors, and not counting for them, at least falsely giving in a charge to the Exchequer far below his intromissions: and all which recriminations were contained in a libell drawn up by the said Sir John, and intended to have been given in by him against Claverous to the Council, and which he ought either to prove, or else be punished as the author of an infamous libell.

Sir John's answers being also read,—the Chancellor reproved him for the tart reflections he had therein on Claveris ingenuity. Then Sir John urged, he might be allowed to adduce what witnesses he had in town, for proving some of the points of fact contained in his answers. This was denied him; and the Chancellor appealed to the King's Advocate, if a diligence ever was in form granted at Privy Council to a defender, to prove his defence, unless he were in a libell of reconvention. This was to hook him to give in his counter-libell. Then Claveris witnesses being called, and his libell, as relevant, admitted to his probation; and Sir George Lockhart, (who was so generous as to lay aside all former private resentments, and appear as one of Sir John's Advocates, on which side I also stood,) being adduced as a witness, to prove that he heard Sir John Dalrymple charge some of the abovementioned things on Claveris; Sir George answered, that such a preparative would be *peffimi exempli* to force Advocates to disclose their clients secrets. The Chancellor thought he might be ordained to depone; but seeing Sir John Dalrymple offered to raise a libell upon the same very particulars, this rendered the examining witnesses on that part unnecessary. There was much transport, flame, and humour in this cause; and the cloud on the late President's family was taken advantage of now; which shews the world's instability.

Sir John alledging, the people in Galloway were turned orderly and regular; Claveris answered, there were as many elephants and crocodiles in Galloway, as loyal or regular persons; meaning there was none of either; which was a bold accusation and reflection on a whole Shyre. And yet

the Chancelor would not allow Sir John to compleane of the exa<sup>ct</sup>ing of free quarters, in the name of any but of himselfe and his tennents only, without he had a commiffion from the rest of the shire, in which they durst not then joyne; sojors getting a more favorable hearing then country gentlemen, as appeared in John Cheisleye's case, (*supra* pag. 256, 260, with Clerk, &c.)

No. 854, *Eodem die*.—Bailzie of Torwoodhead gives in a Bill to the Privy Counsell againt Edward Ruthven, and the Lady Letham, and others, for dispossessing him of the house and estate of Corstorphin, wheirof he was air of tailzie, (see this *supra* 18 *Septembris* 1679, pag. 84;) and therfor he craved repofsession and delivery to him of the charter kift. The Lords, in regard he was dispossessed by ther oun order, theirfor they refer him to pershue *via ordinaria* before the Session; but recommended to the Lords to discusse it summarly. The pretence of ther not meddling with it was, that Edward Ruthven, then out of the country, was not cited: he is since dead, and any right he had falls in to his 2 sifers.—Torwoodhead, *alias* Lord Forrester, by his father-in-law, my Lord Salin's moyen, got himselfe repofessed in the house and yards, reserving the point of right to be discuft afterwards, (*infra* pag. 319.)

No. 856, 15 *Decembris* 1682.—At Exchequer, the late deceast Earle of Dalhouffie's escheat is gifted to Sir William Paterson, for 1000 mks. owing to him by bond. So soon are men when dead forgot.

No. 857, 18 *Decembris* 1682.—At Criminall Court, Mr. James Welsh and Mr. [Patrick] Wernor, ministers, and 13 or 14 small heritors, are forfaulted for being at Bothuel-bridge rebellion, and ther armes reversed, and torne at the Crosse of Edinburgh.

No. 858, 19 *Decembris* 1682.—The foremen and wryters in the Clerks' Chambers, ther bill craving some mitigation of the A<sup>&</sup> of Sederunt made on the 28 of November last, (*de quo supra*, 23 *Novembris*, pag. 274,) discharging them to agent in proceffes is refused, tho they offered to forbear the



agenting in thesse procesſes wheiron they ware ather wryters, ſcrollers, or extracters ; and craved the limits of agenting might be ſet and explained, it being too generall and inſnaring a word.

20 .*Decembris* 1682.—At Criminall Court, one Alexander Home is pannelled for treaſon, in being at Bothuel-bridge in the capacity of a commanding officer, and as a captain, and ſo is excepted out of the A& of Indemnity in 1679, being a ringleader. The Aſſyſe found the dittay proven, and found him guilty of the cryme forſaid ; and he was ſentenced to be hanged for it on the 29 of December. He dyed more ſeriously and calmely then many others of his perſuaſion had done before him. No. 861,  
p. 283.

21 *Decembris* 1682.—The affair betuixt Sir James Turner and Mr. Pilans, ther competition about the lands of Craig, being reported by Boyne, fand, that Mr. James, tho a compryſer within year and day, yet ought not to come in *pari paſſu* to a ſhare of the maills and dueties with Sir James ; becauſe Mr. James, having intrometted already, had got part of his annuelrents, wheiras Sir James had got none : and therfor they allowed him to poſſeſſe till he ware as far forward as Mr. Pilans ; and then allowed them after that to come in *pari paſſu*. This was reclaimed againſt by Mr. Pilans, (who had not ſpred his informations before reporting,) as not the æquality meant by the A& 62 in 1661, ſeing *vigilantibus jura ſubveniunt* ; and all Turner could clame ware by ane aſſion to repeat his proportion ; and even in that caſe he would defend himſelfe, that he was *bona fide* poſſeſſor, as the Lords fand on the      day of 1675, Baird *et* Johnſton. But Boyn favored a ſojor of his oun profeſſion. (*Vide infra* thir parties, pag. 313.) No. 862,  
p. 283.

21 *Decembris* 1682.—At Privy Counſell, Sir John Dalrymple's libell of reconvention was red and admitted to probation. (*Vide ſupra* 14 *Decembris*.) No. 864,  
p. 284.

2<sup>da</sup> Carmichell's caſe mentioned *ſupra* 7 *Decembris* was adviſed, and the Counſell fyned him in 5000 mks., 2000 to the party, and 3000 to the

King; and fyned Mr. William Cheisley, for his apperant knowledge of the cheat, (tho not fully made out against him,) and for his drawing papers, tho untested, in 3000 mks. The pillory was too litle for such a trick. The French are so severe against such rogueries, that ther punishment is death.

3<sup>th</sup> Mr. John Meinzie, advocat, is ordained to be pershued criminally, for converfing with rebells, when he was Shireff of Lanrick; and afterwards was keipit long in prifon, for ane expreffion efcaped him, "that ther ware rebells on the Trefurer's ground, and on the Chancelor's lands of Tarbrex;" tho this was not given for the caufe of it.

No. 866, 23 Decembris 1682.—Archbald Williamson, merchand in Edinburgh, p. 285. *contra* the Bailzies of Hamilton, (*vide supra* thir parties, page 159,) for fuffering Bailzie of Carphin to efcape out of ther prifon. It being farder alledged, that they could not be lyable for his efcape, becaufe they ware only a brugh of barony, and the prifon of the regality of Hamilton was kepted elfwheir; and by decifions in Dury, 12 Februar 1624, Lanton against the Bailzies of Dunce, and the citations their, the brughs of baronies ware not bound to keep prifoners, and the 273 A& of Parliament in 1597, does not oblidge them to it. The Lords repelled this, in refpect it was offered to be proven, that meffengers ware in ufe to incarcerat prifoners their, and that the Bailzies of Hamilton ware in ufe to receave them.

No. 868, 23 Decembris 1682.—At Privy Counfell, the Lady Dundas, daughter p. 285. to Sharp of Houfton, having given in a bill, craving ane aliment of hir husband, who had deferted hir, upon fufpition of difloyalty to his bed; the Counfell ordained the husband to be cited and heard; but becaufe *venter non patitur moram* they allowed hir, *medio tempore*, to intromet with any provifions ware in the barne-year, or about the houle or doucat. (*Vide infra*, 25 Januarij 1683, thir parties.)

## ANNUS 1683.

4 *Januarij* 1683.—At Privy Counsell, my Lord Castlehill, and Wed-  
 derburne of Goffoord, are admitted, on the King's letter, Privy Coun-  
 sellers. No. 872,  
p. 286.

*Item*, One Herring of that ilk, in Galloway, having refet his 2 fones, who ware in the late rebellion of Bothuel-bridge, he came in the Counsell's will and King's mercy for it; and they, in regard of the nearnesse of the relation, wrot to his Majesty a recommendation, that he might grant him a remission: otherwayes they could not but have remitted him to the Criminal Court; tho his case be most favorable, and excepted Tit. D, *de receptatoribus latronum*.<sup>1</sup>

5 *Januarij* 1683.—At Exchequer, David Lindsay, merchand in Edin-  
 burgh, seiking to have a gift of printing he had got from his Majesty past; No. 873,  
p. 286.  
 Andrew Anderfone's reli&t opposed him on a prior gift from the King to be his Printer, which had most exorbitant clauses of debarring others; so that the King's taylor, futor, &c., might as weell clame the sole exercife and monopoly of ther trades. Answered, One presse is sufficiently able to serve all Scotland, our printing being but inconsiderable; and the right and regulation of the presse with us, by the 27 A& Parliament 1551, is *inter jura regalia*, and so the King may give it to whom he will. The Lords referred it to a Committee; and they, on the 12 of Januar, having made ther report, the Lords fand Andrew Anderfone's gift contained exorbitant clauses, restraining the liberty of printing too much, and theirfor they restri&ted his gift to the style, tenor, and books named in Evan Taylor's [Tyler's] gift, who was his present Majestie's father's Printer in Scotland.

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<sup>1</sup> *Vide infra* Blaikwood's case, page 297, *et seqq.* Menochius *de Arbitr. judicum*, casu 347, *et seq.*

No. 874, 6 *Januarij* 1683.—The Privy Counsell declared they would not allow  
p. 286. Sir John Dalrymple (*vide supra* 14 *Decembris* 1682) to examine witneses on this interrogator, whither Claveris sojors took free or dry quarters; but only if they did it by speciall order and direction from him, (seing his sojors ware not cited in this proces;) which was hard, he being present upon the place over ther heads, and is in effect tacitly to incouradge souldiers to take free quarters, and to evacuat the late A& of Parliament in 1681, discharging them.

No. 875, 8 *Januarij* 1683.—At Criminall Court, their is a letter red, approven  
p. 286. and recorded, from his Majesty, allowing the Justices, as the Privy Counsell should warrand them, by way of precognition, to take the depositions of witneses in criminall causes, before indytments be given, that the King's Advocat may know whither the probation be good, and concluding yea or not, before he begin to vex anie. This is a most dangerous preparative, laying a foundation for arbitrary proceedings. For tho they must be adduced again before the pannell in face of Court, so that if they dy before that, ther depositions thus tane before answer and a libell, only to lie *in retentis ad futuram rei memoriam*, cannot be made use of as a probation of the cryme; yet, if they live, it præ-ingadges them to abide in ther re-examination at what they once said, else they are privily threatned to be pershued for perjury; and so they are limited, snared, and hooked, to the pannell's prejudice, being first examined in his absence, without his confrontation to overaw them; wheiras their first deposition should be destroyed and brunt, they being much straitned leift they vary in a syllable, word, or expreffion, differing from what they said first. Law does indeed allow such a generall inquisition and prævious tryall by witneses wher their is a *fama* and a *corpus delicti*, but it is only to try out the person suspected to have done it. But to allow such a tryall after the person is pannelled, and a libell is given him, is unknowen, and contrary to the laws of other countries. It's said, this very overture was brought into the last Articles of Parliament in 1681, and was voted out of doors as illegall. Pitmedden and Harcous, 2 of the Criminall Lords, ware looked upon with a bad eye, because they declared ther disassent in ther judge-

ment as to this letter ; but the Chancelor and others designed therby to facilitat ther work in reaching guilty perfones.

2<sup>da</sup>. Cunyghame of Montgrenan, (see his declaration, he made in the Parliament 1681, against Sir John Dalrymple and others, befyde me,) is pannelled of hy treason, for being at Bothuel-bridge ; and, on his oune confeffion, is found guilty by the affyse.

11 *Januar* 1683.—The debate betuixt the Toune of Dundee and my Lord Halton, now Lauderdale, anent the patronage and presentation of the 2<sup>d</sup> Minifter ther, being reported by <sup>No. 880, p. 288.</sup>, the Lords præferred the Toune's right upon ther dotation, former presentations, and poffeffion ; notwithstanding he was patron of the parfon ; and the contrare feimed to be decided, *supra* on the 18 of November 1680, for the Earle of Hadington against the Toun of Hadington : but they differenced the cafes, for the Toun of Hadinton's poffeffion was not fo pregnant and clear. However, Halton, *juſto Dei judicio*, loſt this, becauſe, to make a leading caſe for his oune, he had induced the Lords to decide for the Toune of Hadington.

*Eodem die*.—At Privy Counſell, Campbell of Caddell is called as No. 881, cautioner for producing one Mackilliecan, a non-conformiſt miniſter ; <sup>p. 288.</sup> and they thought to have gotten his bond forfeaulted ; but he had the man ready to fiſt. They remembered Caddell's oppoſing the Duke of York's intereſt in the Parliament 1681. (See more *infra* 18 *Januarij* 1683.)

2<sup>da</sup>. Severall merchands in Edinburgh are perſhued as importers of goods prohibited by the Proclamation of Counſell in April 1681, and by the A&t of Parliament following in the Auguſt theirafter. Alledged, It was hard to refer it to ther oaths, feing they might forget, and it might open a door to perjury, and inſnare many. The Privy Counſell declared, they ſhould be oblidge to ſwear for ther importing and ſelling a year back from ther ſummons and citation ; but, if the tackſmen of the cuſtomes, and the King's Advocats, inſiſted for any prior contraventions or tranſgreſſions, found, they ought only to prove it by witneſſes, and could not ty them to give ther oaths theirupon.

No. 883,  
p. 288.

17 *Januarij* 1683.—In the debate, in the Inner House, betuen the Earle of Leven, 2<sup>d</sup> son to my Lord Melvill, and Mr. Francis Montgommery, for reducing the contra& matrimoniall betuen Mr. Francis and the laft Countesse of Leven, to whom the Earle is now air, upon minority and læsion, it containing most exorbitant provifions of 10,000 mks. of a free annuity out [of] a crazie and burdened estate during his lifytyme, tho his oune patrimony of 50,000 mks. returnes back to him ; so that he brought nothing to defray debt, or to compense so wast a donation. 2<sup>da</sup> It was nottorly knowen to phyfitians and others, that the poor young lady, by infirmitie and univerfall distempers, was altogether improper and incapable of marriage, or conception of children, and was violented and forced theirt to by hir unckle the Duke of Rothes, then Chancellor. . . . .

2. The Lords, on the 18 of Januar, before answer, ordained both parties to adduce before my Lord Drumcairne, (to whom they remitted it,) a mutual probation what was the condition and rentall of the estate of Leven, the tyme of the late Countesse's marriage to Mr. Francis in 1674, and what ware the debts and burdens then affecting it, to the intent they might confider if hir curators had committed any devaftation, delapidation, or diffipation, by granting irrationall hy and exorbitant unæquall provifions, in favors of Mr. Francis, beyond what the estate could bear ; to the end, upon report, they might modify, lessen, or rectify the matrimoniall provifions, if they saw cause. For, tho our law does not require præcise æquality, *inter dotem et donationem propter nuptias*, as the Roman law did, (Novella, cap. . . .) yet if ther be any disproportion, amounting to an læsion *in re*, our law both hes and does repair fuch debording advantages tane of minors in ther contracts of marriage.

No. 885,  
p. 289.

18 *Januarij* 1683.—Mr. George Dickfon, advocat in a cause betuen Macbrair of Netherwood and one Roome, having given in a bill reflecting on my Lord Salin, as having done him injustice, becaufe his brother, Mr. Alexander Birny, was in the cause, and calling him præcipitant, &c. ; the Lords, to vindicat ther oune authority, did cause one of ther clerks tear the bill in his prefence, and deprived him of his office ; but they restored him again within 2 weeks.

*Eodem die.*—At Privy Counsell, Campbell of Caddell (*de quo supra* No. 886, pag. 288) is pershued as cautioner for Grant of Glenmorieston and his tennents, who had fallen doune upon Roffe, and had robbed and driven away fundry cattell out of Sir George Mackeinzie the King's Advocat's lands. The Lords found the 2000 mks. bond of cautionry was forfaulted; but superceided for 15 dayes, if he should produce Glenmorieston himselfe betuixt and that tyme; seing he offered to prove, that it was not his men, but others, who committed the depredation; only this defence was not admitted, because Glenmorieston was not produced present at the bar.

2<sup>da</sup>. The Earle of Balcarhous, now Shiref-principall of Fyffe, and Mr. Alexander Malcolme, advocat, his Depute, gave in a complaint against John Williamson, Proveft of Kirkaldy, and the Bailzies ther, for opposing the Shireff to execute the pœnall laws against Conventiculars, and withdrawers from the Church, dwelling within that toune, upon the late A& of Parliament 1681, giving a cumulative jurisdiction. Answered, The Magistrats had not been negligent, but had testificats from ther ministers of the regularity of ther peeple; lykeas, they had addressed themselves to the Counsell, and gotten a stop to the Shireff's procedor for a tyme. Replied, The Court they interrupted was held by him after that tyme had expired.

3<sup>da</sup>. James Bailzie, and some of thesse Affisers who, in 1681, (*vide supra* pag. 202) ware convi& as guilty of giving ane erroneous verdi& in Somervell of Urat's case, having been at liberty upon bail, are again committed to prifon, till they should pay ther fines.

19 *Januarij* 1683.—The King's Majestie, and the Marquis of Queanberry, Hy Treasurer, and his Majestie's Advocat, against the Earle of Lauderdale, [formerly Lord Halton] late Generall of the Mint, Sir John Falconer, Wairden, and the Officers of the Mint. (*Vide supra* of this affair, pag. 125, and 266, November 7, 1682.) To the first article of the summons, bearing that they ware liable to refund the quantities of the copper coin wheirin they had exceeded the warrands his Majesty had given them for coining Turners:—Answered, They could not be made countable for this excesse, because not only his Majesty, by 2 exonerations

produced, but also by the generall Indemnity in August 1679, had discharged and pardoned the same. Nather could the exonerations be termed sub or obreptitious ; and that in law all such writs and rescripts doe tacitly bear this clause in ther bosome, *si preces veritate nitantur* ; (as appears from that title, *Cod. de precibus Imperatori offerendis, ibique Perezius in Paratillo num. 4<sup>ta</sup>*, and also by the Canon Law and Decretales, *Titulo de Rescriptis* ;) for tho the Doctors make a great noice of the efficacy of that condition, *si preces veritate nitantur*, yet they teach us that any of the following clauses take it off, viz., ather to insert in the writ the words *motu proprio*, or *ex certa scientia*, or *ex animo deliberato*, or *ex plenitudine potestatis*; or even the *geminatio actuum* doe evacuate it ; and with us, by our stile and practise, the docqueting of writs to passe his Majestie's hand, the passing them throw severall offices and sealls, the presenting them to sundry Courts and Judicators, the recording them in ther books or registers, the obtaining declarators upon some of them, are far greater checks and contrrollers, and more fitt to purge and obviat fraud, sub, or obreption, then thesse abovementioned inventions of the Doctors. And as this proves the validity of the exonerations, so the Indemnity certainly cuts of this perlhuit : for amnesties, of all things, are most sacred, being land-marks and securities *non tangenda, non movenda*, unlesse we would desire, with that bloody Roman Emperor, Caligula, that the wholle people of Rome might have but one neck *ut unico ictu percuteret*, (as *Suetonius, in ejus, vita* tells us.) See the 67 A& of Parliament in 1563, and the 10 A& of Parliament in 1662, which are Acts of Indemnity, and excepts from it the medlers with the publick money. But this oblivion and Indemnity in 1679 is more ample then any of them, being drawn in the most ample and comprehensive termes deviseable, as meanly designed to secure Lauderdale and his party, for the Hyland army that they sent in upon the West in 1678, and ther other exorbitancies ; and the pardoning the rebels who rose at Bothuel-bridge, was but a sham and a cullor to draw on the other, and gave it but a fair ryse, and came in meerly as a pendicle by the by ; and yet now, *justissimo Dei judicio*, it does not now prote& Halton when he founds upon it, and makes use of it. But yet I find the Lords in Fairy and Ker's case, (*pag. 123, 13 Februarij*



1680,) and in Mr. John Kincaid's case, (*supra pag.* 247, 1 *March* 1682,) fand, that the said indemnity did not defend against restitution, and the civil effects of damage and interest, but only from punishment; and that the *vindicta privata et publica* discharged by the indemnity differed from restitution, because the *vindicta privata* was the confiscation of goods, and the *publica* was the inflicting the personal punishment; which two were only remitted by the A& of Indemnity, but no wayes simple restitution. A discharge that Sir Walter Seton had got from the King of his intromissions as collector, did not hinder, but the Exchequer forced him to count again; and none will affirme that this Indemnity in 1679 would defend the Tresurer, Tresurer-depute, or Sir William Sharp as cashkeeper, from counting.—The Lords, immediatly removing the parties, advised this point without written informations, and repelled the defences, and fand the superplus of the coinage more then was contained in the King's warrands, (tho it could not be instructed from the Checker Rolls or otherwayes, that ever that superplus was counted for in Exchequer, or lookt on as any part of his Majestie's revenue,) did not belong to the Officers of the Mint, but to the King; and that the exonerations in ther narrative ware but relative to the warrants, and so could not exceed them, and that the A& of Indemnity did not extend to this proces, which was not pænall, but *rei vindicatio* only, and for restitution. They behooved to vindicat the legality of the report they had made to the King this last summer, upon his commission against Halton, and he most rather suffer then they be affronted, as if they had misrepresented or disguised the truth of that matter to the King. The words of the Interlocutor ware, “ The Lords repells the first alledgeance, founded on the        A& Parliament        James 2<sup>d</sup>, and finds it extends to the Mint; as also, repells that alledgeance bearing that the profit of the copper is a perquisit of the defenders' office, as a part of ther fee, in regard the King's Advocat insists only as to the profits of the quantity of copper coyned more then was contained in the warrands; and repells that alledgeance founded on the exonerations, and finds thesse exonerations extends no farder then to the quantity allowed by the warrands, and not to the malversation in relation to the quantity exceeded;—and repells

the alledgeance founded on the A& of Indemnity, and finds the same cannot secure the defenders from being liable in restitution, *in quantum locupletiores facti sunt* by the profits of the quantitie of the copper coyned more then was contained in the warrands."

2. The next day, being the 20 of *Januar* 1683, the King's Advocat represented to the Lords, that how far they had made profit and benefit, could not be the rule; for what if it were not extant, but they had spent it in living hy, or in playing and drinking? wheiron the Lords expunged thesse words out of the Interlocutor, *in quantum sunt locupletati*; and made them simply liable, whither *in rem versum* or not.

Tho this debate and its Interlocutors took up severall dayes, yet it will not be fitt to divide it, but hear to give it all together.

3. 23, 24, 25, & 26 *Januarij* 1683, King's Advocat against the Officers of the Mint.—It being farder alledged for Lauderdale, and the other Officers of the Mint, that no more of the copper coin could be adjudged to belong to the King but a 12<sup>t</sup> part, (which is his proportion he hes of the silver,) and this also with deduc<sup>n</sup> of the price of the copper, the expence of the working, and the fees of the work men; which being defaulted, the free excrescent and superplus profits, over and [above] all thesse abatements, will be but inconsiderable. Notwithstanding wherof, the Lords fand the wholle copper coin made and stamped, more then the Officers of the Mint had his Majestie's warrands for, did inteirly and *in solidum* belong to the King, without any allowance to be deduced of it for the metall, matter, or forme.

1<sup>o</sup> Because they esteemed it *res furtiva et peculatus pecuniæ publicæ*: but if so then, if not pœnall, yet it was *mixta, partim rei persecutoria, et partim pœnalis*, and so in part pardoned by the Indemnity: Which forced them to run to a 2<sup>d</sup> ground, viz., that it was the King's, *jure specificationis*; the King's stamp and character being pressed on it, he became *dominus totius tam materiæ quam formæ*: but heir *materia* being *potentior et prædominans et reducibilis ad priorem formam*, *dominus materiæ* became *dominus totius*.

2<sup>do</sup> By the said Roman law, in that *modus acquirendi per specificationem*, the ouner of the matter had ane action competent *ad æstimationem et prætium materiæ suæ vindicandum*.—This swerving from the prior Interlocutor, and not being intelligible in law; the next day, the cause being again called, it

was infisted for the Earle of Lauderdale, that he behooved to have deduction of the matter of the copper; for *esto*, the induction of the King's irons and impresse transmitted the property to the King, so that it might not *de jure*, in prejudice of the King, be reduced *ad priorem materiam*, wheirby *præstantia imaginis et potentia formæ trahebat ad se materiam hic*; yet it was alwayes with the burden of the price and value of the matter, seing *Rex non debet locupletari ex jactura alterius*; and the Indemnity pardoned the criminall delinquency on it. The King's Advocat being beaten from the notion of specification, ran to that of accession, that it became the King's, *jure accessionis*, like a board yielding to the picture drawn theirupon, (§ 34, *Institut. de rerum divisione*,) and he being *in dolo* to apply the King's irons to more metall then he had warrand for, he ought not to reap benefit *ex suo delicto*. Replyed, That decision of Justinian's was singular *in pictura ob præstantiam artis*, and yet it still went *cum onere prætij tabulæ*: yea more by the Roman law, *etiam in persona prædonis benignius visum est deducere impensas tam utiles quam necessarias*, and he only lost the voluptuary ones, (C. 38 et 39, D. *de hæreditatis petitione*, l. 22, C. *de rei vindicatione de harum impensarum deductione*.) The Lords being straitned, altered doune right ther former Interlocutor, and found the Officers of the Mint ought to have allowance of all copper stamped by them before the A& of Indemnity 1679, (for after serious consideration, they durst not make too bold with the lousing of this A& of Indemnity, because they knew not [in] what neid they might stand of it or the like A& themselves, ere they had done with ther part of the game,) but fand, whatever copper was coined since the said Indemnity was the King's, without any defaulcations, *confiscationis jure*; and ordained the Officers of the Mint to condescend on the quantity prior to the A& of Indemnity; wheirby they designed to elicit a confession, that they had exceeded ther allowance, which would hold them in a probation; as also to prove the value of the pound or stone of copper; and wold not allow them the current prices it was then giving, but only what it really stood them; and for the expences in coyning, allowed them to default whatever wages they ware yet resting to the artificers and workmen, but refused to allow them what they had already payed.—To the pre-

judices arising by a superfætation of copper coin marked by me, in my other folio Law Manuscript, marked A. at the 16 day of November 1676, folio 264, (when Abbotshall opposed it, and now, *ex eventu*, it had been telling Halton he had not then gotten his will,) we may adde, 1<sup>a</sup> That forrain commodities cannot be bought with it; for strangers will not take it. 2<sup>da</sup> Being small and carelessly keiped, the halfe of it in few years comes to be lost, so that the halfe of the Turners coined since the King came in, if they ware called for in now, are not extant. 3<sup>a</sup> The Babies [bawbies], or 6 pennie pieces, force and tempt us to buy more of small commodities then we need, and they who formerly bought but a Turner's worth of pins, spice, &c., are now in a manner forced to buy a Babie's worth, the Turners having become very scarce. Amongst the Venetians, I find it is death to apply one pennie of the publick money to ther oune privat stock or use.

4. Then the King's Advocat insisted on the 2<sup>d</sup> article of the libell, (see the large Information befyde me,) anent his refounding the profit of the bullion; and tho Lauderdale alledged, that the Master of the Mint, by his office, gift, and bond of caution, was liable for that; yet the Lords fand the Generall of the Mint, as Controller of all the rest, liable for his negligence and omission, equally and principally to the King, and not only *subsidiarie*, reserving him his releiff, as accords, against the Master. And for this ther was cited the 8<sup>th</sup> A& of Parliament in 1669, anent the bullion, mentioning the Generall as weill as the Master, and the *Lex* 9, § 8<sup>vo</sup> *D. de administratione rerum ad civitates pertinencium*, wher *curator tenetur nomine collegæ si prohibere eum poterat*. Yet I find, *Lex* 11, 12, & 13 *D. ad municipalem*, make him only liable *ordine discussionis prius servato*; and all cautioners for administrators have the priviledge not to be conveyned in 1<sup>a</sup> *instantia*, till the principall be first discusst. This Interlocutor of the Lords, finding the Generall liable for all the malversations and omissions of the inferior officers of the Mint, was grumbled at, for they had not ther commissions from him, but from the King; and he could be in no worse case then a tutor or oversier, *qui tenentur tantum de dolo lato et levi culpa*; yet I find *mandatarij*, (among whom are also contained they who have commissions for offices and trusts,) are liable in

law *pro culpa levissima* ; but that most only be understood of ther ounie, but not of the *culpa levissima* of thesse under them, tho they be answerable also, *ex quasi delicto*, for ther faults. And on this rule, masters are made liable for ther tennents and servants, and Shireffs for ther deputes ; (see *Statuta Davidis* 2, *cap.* 30,) parents and husbands for ther children and wives, in some cases. The Generall is made liable for the inferior officers' malversations, not only because his knowledge, connivence, and command is presumed, but he should have impeded and discharged them to have coyned more then was in the King's warrands, and 2 copper journeyes, and should have revealed it, and not have concealed it, and divided the spoill betuixt them ; *et Titulo Cod. de falsa moneta, etiam conscij puniuntur*. As to the point of releiff among themselves, if they be all proven to be delinquents and *in dolo*, and to have malversed in ther trusts, this ought to cut of all releiff, as is elegantly decided in the case of Tutors, *l.* 1, § 14, *D. de Tutela et rationibus distrahendis*, (which may be urged against Eleiston's proces against his contutors,) and if one of them be dead, (as in Mr. James Falconer's case, who is conveyened for his father the Warden's malversations,) such actions *de dolo quæ factum puniunt, non dantur contra hæredes*, wher it was not established, or Litiscontested against the defunct in his ounie lifytyme, *l.* 9, § 1, *D. Quod falso tutore gestum est*. (Yet I find Capers, tho decerned to restore ships or goods unwarrantably seized on and taken, they have releiff amongs themselves, tho all decerned *in solidum* : See Captain Smeton and Mr. David Dewar, the advocat's case, about Samuel Souton's ship, in my folio Manuscript D, at the 25 of June 1678, page 22 : *Item*, the 4<sup>th</sup> Manuscript, A 7, page 17 : *Item*, Stair's Law Institutions, Title 12, page 225.)

5. Then the Lords, after debate, advised the 7<sup>th</sup> point or article of the libell, about the profit they had upon the exaltation and crying up of the marks lately in 1680 ; and fand for all bulzeon, silver coyned or uncoyned, they had lying besyde them in the Mint-house at the tyme of that A&, ther was due to the King the 8 pennies they gained on each mark of it, and ordained them to restore it ; and for what bulzeon they got in since the said A& of Counsell, seing they gave the merchand 55 shillings 10 pennies for each unce of bulzeon they brought in formerly, and gives

him 58 shillings 8 pennies since that A&, that they can be countable to the King for no more but the summe of , unlesse the King's Advocat can prove they compounded with the merchand for lesse then the said 58 shillings 8 pennies, and whatever they got doune of it, finds it belongs to the King.

6. Then the King's Advocat and Sir Patrick Home infisted on the 8<sup>e</sup> article, anent the melting doune of the dollars and ducatoons, to make bulzeon of; the Lords, (notwithstanding the 249 A& 15 Parliament, Jac. 6, in 1597, which they fand in defuetude as to the current coine, tho forrain,) fand, that the melting doune of dollars was unwarrantable *ab initio*; and of ducatoons, only since they ware cryed up, as passing money in 1680; and that the King most have the same profit on them, as he would have had of imported bulzeon, viz. the 12 part; tho Lauderdale alledged it was only the 30 part; and found, that not only the coyne bearing the King's impress, but that no forrain coyne that passes as current, ought to be melted doune at all.

7. Then after debate on the articles anent the remedies of fynesse and weight, the Lords fand a grain above and below the standart of weight, and 2 grains above or below 11 penny fyne, as the standart of the intrinsic value and fynesse, ware allowed only as a latitude to work on, wher casually they fell above or under, because it would be ane unsuperable labour to be precise; but fand them culpable, the King's Advocat proving they wrought on the remedies beneath standart, as a constant advantage, so that when they came to trone, or weigh a mark peice, if they fand it exact weight, they would pair, raze, and scrape a grain of it, till it came to the remeid; which fraudulent practise being proven, the Lords fand them liable for restitution of thesse grains; and finding the article of John Falconer's bond to Alexander Maitland was made up of thir remeeds, they resolved to confiscat the said summe to the King.

8. The King's Advocat thereafter infisted against Mr. James Falconer, that he, as succeffor *titulo lucrativo post contractum debitum*, most be liable for his father's part; which he did urge not only for all deeds done by his father as Warden, before he gave him a disposition to his estate, but even for all deeds after, because he being intrusted by the King with his

money, he becomes debtor from his first entry unto his administration and office, and any disposition he make afterwards to his eldest son of his estate, must be reputed fraudulent, and ought not to prejudice the King's tacite hypothec, till he be paid of his own, which is agreeable to law, and the Fisk's privilege. (So Ant. Peregrinus is clear in it, *libro 6 de jure Fisci, cap. 6 et 7, pag. 662 et 687*, and he cites laws for it.) Yet this will exceedingly mar commerce with such publick officers, and is, on the matter, an interdicting of them.

9. Then he insisted for the annuallrents of their summes arising from their delinquency, and *mora* in not paying in what they were owing, the King's prejudice resulting therefrom, and therefore annuall is due heir, *nomine damni et interesse*, tho they were rather law nor pactio to infer annuallrent; and this is also another privilege of the Fisks. But there are more principall summes decreed already, then all the Generall and the other officers of the Mint their estates are able to pay, (if his Majesty does not remit somewhat of the rigor;) so that they need not insist for annuallrents, unless it be for example, and to strike terror in others; and its impossible that any can manage the Mint office, if they be so strictly searched. But it will be the Earle of Stafford's case, who was found guilty, yet with one breath it was declared it should not be drawn into a preparative.—However, let this case of Halton stand as a great instance and beacon of the flux and inconstancy of all sublunary greatness.

10. On the 2<sup>d</sup> of February 1683, the Lords found my Lord Maitland, then newly come home from London, liable as conjunct Generall with his father, tho he never meddled; because he ought to have supervised, and his being adjoined when he was so young as not to be able to officiate, was his father's fault.

In this cause, Halton's too much debate and opposition made the decree the stronger; and irritated the Chancellor so, that Halton having taunted Sir Patrick Home at the bar, he was reproved for it, and he was advised not to say any more, but to leave them to do what they pleased; for these Lords (as Forret, &c.) who swore by him formerly, were so cowardly as not to appear for him, but voted as cleverly against him as any. They thought to have hooked him in the debate, if Sir John Fal-

coner was bound to releive him, and to have freed Sir John ; but Halton fmelling it, declared he had no proces of releiff againft him as yet, and would not infift now. It may be doubted, if the Chancelor or other Lords who ware on the firft commiffion, and had already given ther opinion ther againft him, might not in law have been declined as prejudicat, and pre-engadged.—Some of the votes againft Halton, ware carried only by the Extraordinar Lords. *Queritur*, If fuch Interlocutors may not be fufpected as not altogether confonant to law, the Extraordinars not being bred lawyers ? In this proces, the Lords followed the ancient fummari way of advifing proceffes, by debating and difcuffing the relevancy of one point, before they heard another, and removing the parties prefently, without written informations, and giving them a diftinct Interlocutor on each of them.

11. The A& of Litifconteftation in this Mint-caufe being extracted, the Lords, on the 20<sup>th</sup> of February 1683, appointed Castlehill, Boyn, and Drumcairne, to receave the probation, and to perufe and prepare it to the wholle Lords, and theirin to take the help of Lieutenant Generall Drummond, Gordon of Gordonfton, and Bailzie Baird. - This was thought od, to adjoyne affeffors to the Lords ; but the matter was fomewhat out of the road.

12. 20 *Martij* 1683.—This tedious proces was at laft advifed by the Lords ; and they fand it proven by John Falconer Warden his depofition, that ther was 17,000 ftone weight of copper coyne, tho ther was only warrant for 10,000 ftone, (yet it was objected, that John immediatly retracted and amended his depofition, but they would not write it ; and that he was only *testis fingularis*, and that it was not tane *in judicio ordinario*, but *in fummario* on the King's commiffion—fee *alibi* of this ; yet it was alledged, that he being a party, knew beft what was coyned ;) and fand, that Halton had taken 600 lb. fteling from Sir John Falconer, to get Sir John's account of bulzeon pafst and cleared ; which they decerned Halton to pay back to the King as *caducum*, being a bribe, unles he condefchend on another caufe of his giving him it : And fand the summe they ware all lyable in conjun&ion to the King, was 72,000 lb. fteling, for which they decerned them all *in folidum*. (*Vide infra*, the King's



determination upon this decret, sent up to him at the tent day of May 1683 : it's page 322.)

20 *Januarij* 1683.—Maiffon, the bankrupt, was this day seized on and imprisoned, and his books, for discovering the fraud against Street and Jackson, are sealed up. (See Mackenzie's observes on the Act of Parliament in 1621, anent this Maiffon, and of summar warrands to apprehend bankrupts.) No. 890, § 2, p. 296.

3. The Chancellor and Privy Counsell granted the like summar warrant for securing Alexander Tait in Leith, the leid ure man, at the Lady Hopeton's instance, because he was suspected of going to flee, tho ther was no caption against him : so he was put under caution.

25 *Januarij* 1683.—Major James Wood in Edinburgh, against Murray of Dunypace, or Spot, reported by Pitmedden. The Lords, before answer, ordaines the parties proctors to condescend on the parties commoners at the transaction anent the absolut disposition of the land of Spot to Murray the suspender ; and ordains them and the witnesses insert in the disposition to be examined what was *tractatum* betuen the parties in relation to this matter ; and ordains the Lord reporter to hear the parties proctors upon this point, anent Wood, Bisshop of Caithness's filling up of the blank in the bond ; as also recommends to him and my Lord Drumcairne in the meantyme to indevor to settle the parties : who agreed them on a summe.—It's not to be presumed that the Bisshop, by his consent to the 2<sup>d</sup> disposition, designed to prejudge himselfe and his daughter of what was formerly provided to him by the former laird of Spot. No. 892, p. 296.

25 *Januarij* 1683.—At Privy Counsell, Mr. John Hay of Woodcock-dail, Shireff-depute of Lithgow, is imprisoned and suspended from his place, for his interfairing, competing with, and opposing the commission my Lord Lithgow had from the Counsell, for punishing phanaticks. No. 893, p. 296.

2<sup>da</sup> *Item*, the Lady Dundasse's bill (*de quo supra* 23 *Decembris*) against hir husband's friends, craving ane aliment, was debate : The Counsell fand, tho by the grandfather's settlement of the estate, Ralph was absolutly

put in the discretion of 13 freinds, ather to give him the hail lifrent, or if he misbehaved, to deprive him simply of fee, reverfion or lifrent; yet nather the goodfire nor freinds could *contra dictamen naturæ* refuse him ane aliment, till first they had, by the sentence of some competent Judge, declared him unworthy of thesse common benefits of mankind, (such as bread is,) and therfor they, for the freinds rashnesse, decerned fuch of them as fubfcrived the difcharge of the reverfion, and who had abfolutly eftablifhed the fee of the eftate in Walter the 2<sup>d</sup> brother's perfon, without referving any aliment to Ralf, not yet found guilty, to pay the faid aliment of 100 lb. fterling yeirly, *pro rata* and *partibus virilibus*, amongs them; and divides it in 3 parts, viz., 600 mks. to the Lady for hir felfe, 600 mks. to hir for hir children, and the other 600 mks. to the faid Ralf himfelfe, feing he refused to cohabit with hir; And allowed them ther releiff of Walter, on whom they had fetled the fee of the eftate of Dundas; and allowed fuch of the freinds as had not fubfcrived the faid difcharge of reverfion, when they fhould be charged on this decret for payment of their proportionall parts, to fufpend without caution or confignation, they inftru&ing ther hands is not at the faid difcharge. The Counfell did this, not only in regard the freinds had contemned a prior order of Counfell, modifying to Ralf a 100 lb. fterling; but they alfo thought this would be the moft effectuall way to caufe the freinds (who had feduced and drawen him away from his wife, on pretence of hir unchafteity) bring him back again, when they fand ther plot of being rid of hir did not fucceid; or elfe force them to raife a divorce, if they could prove adultery on hir.—This Interlocutor was afterwards ftopped, and referred to a Committee, who reftricted the fumme to 1200 mks. in all.

3<sup>uo</sup>. Mr. John Philp, late minifter at Queanfferry, is imprifoned by the Counfell, for treafonable expreffions uttered by him againft the King and Duke of York, calling him a Papift, and that they intended to introduce Popery. (*Vide infra* more, page 313.)

*Item*, Mr. John Spreul, once a Clerk of Seffion, is brought in prifoner to Edinburgh, upon fufpition again. See him incarcerat *supra* in May 1679, page 69.

26 *Januarij* 1683.—Collonell James Meinzie is imprisoned by the Exchequer, till here pay 9000 mks. given him, in *anno* 16 , out of the King's Treasury, to build a fort at Innerlochy against the Highlanders, with the annuelrents since the refait of it, seing the fort was never built ; tho he produced my Lord Argile's refait of the money : but reserved him action against Argile and Lawers the other cautioner as accords of the law. No. 894,  
p. 297.

27 *Januarij* 1683.—Sir John Harper, advocat, is committed to the Castle of Edinburgh, in respec<sup>t</sup> it was deponed against him, he had conversed with one Laury a rebell. Every gentleman gets not that credit of being sent to the Castle, but are put in the Tolbuith. This is like the old way of charging men to enter ther persons in prison, such a day. *Queritur*, If Duke Hamilton, Sir John's constituent in the Shireffship, should be answerable for his malversations in that place and capacity ? No. 895,  
p. 297.

Their is also a proclamation, over the Croce of Edinburgh, against James Stewart, and sundry other fugitive Scots, living in Holland, sum-monding them to come home and answer within fixty dayes ; and discharging any to keip correspondence with them, by letters or otherwayes, under the payne of rebellion.

*Eodem tempore*.—The Hy-Treasurer emitted ane order, that whoever had signators of lands, escheats or the like lying unpassed, (which many did, because they would not take the Declaration put to them,) if they did not come and take them out, and compone for them within a moneth, they should be lacerat and destroyed, tho they ware even past his Majestie's Royall hand, or contained Novo-damuses ; which he now refuses to accept of, (so cautious is he,) without a speciall letter from the King. No. 897,  
p. 297.

*Item*, At the same tyme, the Exchequer sets a tack, for one year only, of the park of Halyrudhouse, (which they took from Sir James Hamilton and the Earle of Hadington, for refusing the Test,) to widow Todridge, for 5000 mks. by year ; which is 1000 mks. more then it payed formerly.

31 *Januarij* 1683.—William Laury of Blaikwood (*de quo supra pag.* 274) No. 899,  
p. 297.

is brought upon the pannell at the Criminall Court ; the dittay found relevant ; and his defences repelled. Tho this took up severall dayes in Februar, yet as I did in the Mint proces, so heir I will conjoyne the wholle matter together. His dittay ran on his converſing with and reſetting Rebels that had been at Bothuel-bridge, and was founded on the 15 A& of Parliament in 1449 ; A& 97 in 1540 ; and A& 144 in 1592. The defences proponed by Sir George Lockhart for him ware, that the libell was irrelevant and inept, being *generalis, vagus, et incertus*, not condeſcending on the particular tymes and places of the converſe, and perſons with whom ; and cited *legem 3<sup>am</sup>. D. de accusationibus* expreſſy for this. 2<sup>do</sup>. The forſaids A&s of Parliament meant only witing and wilfull converſe with and concealling of them whom they knew to be rebels and traitors, and who ware intercommoned, (that being only the badge by which men ware prohibited and put *in mala fide* to converſe, with them, as if they ware infected with the plague,) and that the Popes, by ther bulls and excommunications, had put wholle kingdoms under interdicts ; but ther ware never ſuch generall prohibitions as thir allowed by any lawyer, or any ever perſhued in Scotland upon ſuch a head as this before now ; which would reach all the weſtren ſhires, and many elſewheir. 3<sup>do</sup>. By the 29 chapter, Statut David 2<sup>d</sup>, the reſetters of malefactours cannot be perſhued till the principalls be firſt convi&. For I put the caſe, Blaikwood ſhould be now found guilty of reſetting ſuch a rebell, and afterward, that perſon ſhould be tryed and found innocent, *quid juris* then ? the ſentence againſt Blaikwood would infallibly be injuſt. Notwithſtanding of all which, the Criminall Lords (being overawed) did find the dittay relevant to infer treaſon ; (tho the 97 A& in 1540 cited, inſi&s only confiſcation of moveables and death, but the 2 other A&s are more generall ;) and repelled his defences ; and found it relevant to the Advocat to prove he had converſed (tho it was proven he was not heritor, but only tutor and chamberlayne to his grandchild) with Rebels, ather intercommuned or denounced, or nottor, or habite and repute ſo. Tho it was offered to be proven, that theſſe called Rebels, had converſed openly and avowedly in all places, for 2 years before, without moleſtation from the King's forces, and ware repute free liedges and purged. In this cauſe the King's

Advocat brought in severall witnesses prisoners, by a squade of the King's guard, which had not been usually practised before.—Tho this Interlocutor was of most dangerous consequence, yet it could not have happened on any that was lesse regrated, or worse beloved then Blaikwood. However the Chancelor and Statfmen have overruled the Judges to this decifion, yet it is upon a very politicall designe (as I suppose); thinking this will prove one of the most effectuall wayes to banish all thesse Rebels out of Scotland: for men being thus frighted to converse with them, they will nather get harbory nor refett, which will quell and clafh all future risings in armes, wanting incouragement, and Scottfmen are not governeable without fuch ufage, fo that it may be of great advantage for the future peace and tranquillity of our country.

5<sup>th</sup> *Februarij* 1683.—Blaikwood appeared in the Criminall Court again, wher they infifted on the grounds of his exculpation, viz., That he was not heritor but only tutor for his grandchild, and did not refide ordinarily in the Weft but at Edinburgh, wher it could not be pretended that thesse perfons for whom he was accused, ware nottorly knownen to be Rebels; that one of them had a paffe from the King's Advocat, whom he had difmiffed for lack of probation, and that he had perfhued removing againft another of thesse rebels before the Sheriff, and had ejectioned him out of his ground; which is all that the late A& 4 Parliament 1681 requires. Yet thir ware all repelled; and the Justices found he should have presented him to justice as a rebell; and the removing him of the land was not enough.

Then, on the 6<sup>th</sup> of Februar, he was again brought to the pannell, and he came in will, and submitted to the King. Theirupon some of the Justices ware sent to the Chancelor and some of the Privy Counsell to see if they needed lead probation againft him, fince he had confest; but they ware appointed to doe it, to give ane evidence, that what they had alledged was not calumnious; wheirupon the witnesses ware led, (ther former depositions that had been taken being first brunt in the fyre, leift it should be esteemed a præ-ingadgement,) and severall acts of refet and converse ware proven againft him; and the Affise being inclosed, returned him guilty.—I heard some charge Sir George Lockhart with ane

omiffion, in forgetting to propone on the 126 A& Parliament 12, James 6, in 1592, wher only denuntiations at the mercat croffe wher parties dwells, puts the liedges *in mala fide* to refet, but not a denuntiation at Edinburgh; which was the cafe of Blaikwood's rebels; for this was a moft important and material point.

7 *Februarij*.—His fentence was pronounced, viz., That he fhould be taken to the Croffe of Edinburgh, on the 28 of Februar nixt, and his head ther to be fevered from his fhoulders, and all his lands and moveables to be forfealt to the King; and his armes ware reverfed and torne at the Croffe with foud of trumpet.—They gave him thir 20 dayes tyme to apply to his Majefty for a pardon, if he could obtain it: but without recommendations from our Court heir, he could not exspect to come fpeed at London.

This feeming rigorous procedure with Blaikwood, who had been very wary, cautious, and circumfpect in his walking, (tho of difaffected principles,) frightened and allarumed many; for they confidered, that ther ware few in the 6 weftren fhires but ware more guilty of this fort of converfe with thoffe who had been at Bothuel-bridge then he; and now it was apparent that the Chancelor and prefent Governors ware refolved to put theffe laws vigoroufly to execution. And they did not ftand to blame Rothés, Lauderdale, Halton, and the other late Minifters of State, who did not poize the execution of the laws and gouvernement with ane æquall hand, but fometymes relaxed and flattered the Fanaticks, as if they had been afraid of them; clapping ther heads; and at other tymes with the Hyland hoft, and the Bond and lawborrows, would not [only] perfecute, but even extirpate them:—and it had been telling that country that my Lord Stair, Craigie, &c., had not oppofed the taking that bond againft Conventicles in 1678; for it might have proven ane effectuall medium of keeping the commonality in aw, ther mafters once being bound for ther good behavior not daring give them the leift connivence. However, if Blaikwood's Interlocutor be defigned to be made a leading pra&tique againft all concerned, the King may get forfealted lands enugh; and the Indemnity in 1679 will happen to doe more hurt then good for quieting the country; fo that by this Interlocutor of Blaikwood's, ther is

almost ane absolute necessity of a new Indemnity ; (which came in Aprill, clogged with the Test, and fundrie other restrictions, when the Circuit Court was appointed.) For that pardon coming so suddenly after Bothwell-bridge rebellion, it took away the terror and apprehension of it, so that scarce any stood in awe to take home these persons for tenants or servants who had been at Bothwell-bridge, without examining more whether they had taken the bond, which was the condition of that Indemnity ; and so this promiscuous converse is like to prove now a great snare ; and there are 20,000 men in Scotland engaged in this guilt without any disloyal purpose, but merely thro inadvertency, and pity and compassion to these bodies.

On the 8<sup>th</sup> of Februar, Blakwood gave in a petition to the Privy Counsell for a recommendation to his Majesty for a remission ; but it was not judged humble and submissive enough, and so it got no answer.

On the 12 of Februar, the Marquise of Douglass gave in a bill to the Counsell, craving a prorogation of Blakwood's tyme of execution, because he had been his Chamberlain these 10 or 12 years bygone, and had not given him in his accounts, and it would require some tyme. The Lords waved this bill, but ordained my Lords Dundonald and Abotshall to take a view of the counts. Then, on a new bill given in by him on the 22 of Februar, they prorogued and continued his day to the first Friday of Aprill ; and then, on ane new application, to November 1683.

This case of resetting Rebels is much agitated by the Doctors, and they make resetting *frequentativam*, and so not a single act, and ane abstracting them from justice and concealing ; which is a step and degree farther then naked converse. See *Jac. Menochius de Arbitrariis judicium Quæst. casu* 347 et 348, where a father *receptans filium bannitum*, or one *receptans ignoranter vel ut caupo* are excused. *Item, casu* 530, 548, 551, where the favorers and resetters of hereticks are punished.—This crime of resetting traitors has been little noticed in Scotland as treason. I find in the unprinted Acts of Parliament in 1455, James 2<sup>d</sup>, “that none reset the Earle of Douglas ;” and by the last printed Act in 1540, King James the 5<sup>th</sup>, it gives a generall pardon to all but them who corresponded with the Earle of Angus and his brethren, only since they were faulted

and not before. Now it was easy to shun the falling into that cryme, being few and eminent persons, not ane obscure rabble, as thosse manie thousand rebels at Bothuel-bridge ware; and since 1540 till now, the rigorous pershueing of this cryme of reset hes sleiped till this proces:— But reason of State may prevaill over all this, wher under the pretence of acts of common humanitie, they support and keip life in the rebellion, so it cannot be extinguished without punishing all. And the crooked tree moft be bended contrare to the other side, to bring it to a rectitude, and *ubi crimina frequenter grassantur, tunc exacerbantur pœnæ*. But *distingue tempora*, and this cryme of reset is ather more or lesse according as the effects and consequences of it are more or lesse influentiall or pernicious to the State.

No. 903, 1 *Februarij* 1683.—At Privy Counsell, John Black, tobacco-cutter, p. 300. pershues long William Johnston, merchand in Edinburgh, (who shortly after this broke,) for wrongous imprisonment of him, after he had given him a discharge of the debt, and tearing the said discharge meerly upon the pretence that he said it was false. William alledged Black did rashly tear it himselfe. The Lords appointed a committee to take a conjunct probation.

2<sup>da</sup>. The King's Advocat, and Hemsheid his depute in the Regality of Dalkeith, against the Deacons of trades and ther electors in Dalkeith, for accepting, electing, and exercising, without taking the Test, contrare to the two Acts of the late Parliament in 1681, anent the Test, which mentions brughs of Regalities, such as Dalkeith is, as weill as brughs Royall; tho they contended they ware not oblidged. The Lords so far tolerated ther bygane error, as to ordain the pershuar before answer to prove they ware erected in deaconries, and incorporat; and then ordained them, betuixt and that day 8<sup>e</sup> dayes, to take the Test, otherwayes to be fyned.

No. 906, 7 *Februarij* 1683.—Sir Arthur Forbes, Vicount Granard, Lady p. 301. Margaret Hay, and the Lady Berfoot [Bearford], gave in a bill against George Seton of Barnes, complaining he had vitiat a principall agree-



ment, or decreet-arbitrall past betuixt his father and him in 1658, by making 1800, 1600, and *his* estate, *this* estate, and adding the words *rents*, which corrupted the sence. Answered, They were not vitiations, but amendment insert in it at the very beginning, by the arbiters. The Lords having considered the bill and answers, they recommend to my Lord Register, and my Lord Reidfurd, to hear the parties anent the vitiation of the said decreet-arbitrall, and upon the haill points within controverted; and for that effect grants warrant to the Comisair Clerk of Edinburgh, to exhibite and produce the principall decreet-arbitrall in quæstion; and to the Clerks of Session, and Keepers of the Registers and Records to exhibite and produce before the saids Lords, any grounds or warrands, and books that can clear the wholle matter: and ordaines the saids Lords to make report. (*Vide infra pag.* 319.)

9 *Februarij* 1683.—The bill of suspension presented by the Baxters of the Cannogate, against the Magistrats of Edinburgh, for fying them in 10 lb. Scots the peice, for importing bad, light, and insufficient bread on the mercat dayes to Edinburgh, being reported by Forret: the Lords fand the Magistrats had power, not only by the A& of Privy Counsell in 1609, and ther oune A& in 1649, but also by the Lords of Session's allowance and immemoriall possession, to cognosce and try the weight and sufficiency of all bread, tho imported from the Cannogate or elsewher, (tho in the places wher it was baken, they had ther oune Deaconries, or a different standart of weight) and fand they had done no wrong; but ordained them to be set at liberty out of prison on consigning of the fynes in the Clerk of Session's hands; and ordained 4 of ther number to confer and meet with the Magistrats anent the regulation of the bread merkat in tyme coming, both as to weight, fynesse, and price. No. 908,  
p. 301.

9 *Februarij* 1683.—The Parliament which was to have met the 15 of March nixt, was prorogued, by proclamation over the Croffe, in obedience to a letter from his Majesty, to the 10 of Jully nixt. No. 910, § 2,  
p. 302.

12 *Februarij* 1683.—The probation led betuen Claveris and Sir John No. 911,  
p. 302.

Dalrymple, (*vide supra* 14 Decembris 1682) being advised by the Counsell, they fand, that Collonell John Grahame of Claverhouse had done nothing but what was very legall, and consonant to his commiffion and instructions, and the Chancelor complimented him so far, (tho since, they have chanced to differ,) that they wondred that he, not being a lawyer, had walked so warily in so irregular a country ; (for he ascryved the reduction of the West to a peaceable conformity and reformation, to himselfe ;) and therfor the Chancelor gave him the Counsell's thanks for his incouragement ; and fand that Sir John Dalrymple, tho a lawyer and Bailzie of the regality of Glenluce, had exceeded his bounds, and had weakned the hands of his Majesties authority, and the Counsell's, and ther commiffions, and interfaired with them ; and therfor they declared the said Sir John to lose his said heretable Bailzeary during his lifytyme, and to pay 500 lb. sterling of fyne, and to enter that night in prison in the Castle of Edinburgh, to ly ther, not only till he pay it, but during the Counsell's pleasure. Some ware for a 1000 lb. sterling fyne. The consult of the Privy caball, (viz., Chancelor, &c.,) thought this rigor absolutly necessar to discouradge all from topping or opposing ther military Commiffions they shall issue out. (See more, page 306, *infra*.)

No. 912, 13 *Februarij* 1683.—The proces betuixt Sir William Ker, and Sir William Bennet of Grubet, and Charles Murray of Hadden, and others, anent the debatable lands on the borders betuen Scotland and England, being advised, the Lords fand, the King and Sir William Ker, his donator, had the right of property ; but that præscription might also run against his Majesty, and therfor fand, that the neighbouring gentlemen having conterminous and adjacent lands, might præscryve, by 40 years possession, a right of commonty, and a servitude of pasturage, throw the famen.

No. 915, 14 *Februarij* 1683.—The ships called the Patience and Palmtree, (*de quibus supra pag. 274*.) are decided to be free, in favors of the strangers, and the Capers made liable for restitution, each of them *in solidum*. John Inglis, who manadged all this affair for the strangers, and fought to eat it all up with exorbitant accounts of expenses, threatned he would exa& it

of Bailzie Baird, one of the defenders, and leive him to seek his proportionall releiff from the Earl of Hadinton, as representing Rothes, the Earl of Lauderdale, Sir James Stanfield, &c.

13, 14, & 15 *dayes of Februar* 1683.—Thir dayes ware spent in advising No. 916, that tedious improbation of Sir Robert Murrays against Richard Murray<sup>p. 303.</sup> of Brughton, (*vide supra pag.* 184, *et seq.*) of the deeds of lease and release of the Earle of Annandale's estate in Ireland; and the Lords fand them false and feinzied; and the sentence was pronounced on the 15 day. Brughton gave in declinators, [1<sup>o</sup>] Against the Marquis of Atholl, as having right to a part of the Irish lands, which was the subject matter of the controversy: he declined himselfe; but to shew he would take no advantage of Sir Robert Murray, he brought in the disposition, and teared it before the Lords; but I hear, within 8 dayes after, it was renewed to him by Sir Robert Murray. 2<sup>da</sup>. Against Drumcairn, as one who had agented the affair for Sir Robert, before he was a Lord. And 3<sup>da</sup>. Against Nairn, because he had exprest himselfe partially against Brughton, in saying, Hares should have fair hunting, but wolves may be killed any way. The Lords refused the declinators against them.

2. The Treasurer and other Lords, to the number of 5 or 6, who ware Brughton's friends, designed only to have the deeds found [im]probative and null, on thir 2 accounts, 1<sup>a</sup> This would have salved Brughton's reputation, and salved him from any hazard or punishment. 2<sup>da</sup>. Such a decreet as that would not have been regarded in Ireland; which they would have looked on as only null for want of formalities or solemnities required by the Scots Law, such as the wryter's name, &c., nowayes founded on the *jus gentium ubique receptum*; but being found false, that is a vice which is regarded *per totum orbem*.

Some affirmed, this was a dangerous decifion, to find a writ null upon extrinseck probation of being *alibi*, &c., wher the 2 instrumentary witnesses infert did abyde at the wryts, as true and reall deeds which they saw Annandale subscribe: only the hazard of the preparative was the lesse in this, that thesse 2 witnesses, Maclellan and Hounam, ware *gravati et pessimæ famæ*; and no case will readily occur again with all

Brughton's circumstances ; and so it needs not be a precedent, or leading case. But this teaches us, great heed should be taken to get and adhibit famous honest witnesses to writs of importance. 2<sup>da</sup> It was thought arbitrary to find the indire& articles of falsehood proven heir ; it being evident ther was not one of them fullie proven by 2 concurring witnesses. But it was answered, Ther being a *semiplena probatio* by one witness, or mo upon hearsay, in every one of them, &c., thesse imperfe& probations being conjoyned, they might amount to a conviction for satisfiing the Judge's mind that the deed was false.

The 2<sup>d</sup> point the Lords advifed, If thir deeds should be lacerat, cancelled, and destroyed, they being now found false. Sir G. Lockhart, for Brughton, alledged many peeple in Ireland had got subalterne rights, who not being called nor heard, the evident could not be torne : yet thesse rights, *resoluto jure dantis*, most fall in consequence. Some of the Lords thought they should, by a letter, acquaint the Irish Judges with it first ; but it was carried, they should be clipped and torne whenever the decreet should be extracted. Then 3<sup>a</sup> The King's Advocat urged, that the Lords might remit him to the Criminall Court, to be punished capitally as a falsary ; and that they might presently secure his person in prison till that tryall, for he had the confidence to be going publickly up and doune the streets, after they had found it false. The Lords thinking they had gone a great enough lenth already, and to give him a fair opportunity and occasion to escape, they refused to remit or secure him ; but allowed the Advocat himselfe, if he pleased, to insist against him criminally, and to lead what probation he thinks fit : but if ther decreet do not bear that it remits him, it will not be *probatio probata* to the Affise. The reasons of this ware, 1<sup>a</sup> It was not proven that he was the fabricator himselfe, but only that he was in the other rouse when it's said to have been subscribed ; and so he is only airt and part in using it : (yet see A& 22, Parliament 1621.) 2<sup>da</sup> The deeds ware not found false on the dire& manner of improbation, but only upon indire& articles conjoyned and accumulat together ; which at best is but a presumptive and illative probation ; and it ware very hard, upon such presumptions, to take away a man's life.—Dury, on the 14 day of July 1638, Dumbar, &c., tells us, the Lords in

such cases use to punish the falsaries themselves, *pœna arbitraria*, by banishment, stigmatizing them, setting them on the pillory, infamy, &c., without remitting them to the Justices: yet I find Kennedy, in 1663, hanged for falsehood, upon a decreet of the Lords, upon a very weak and presumptive probation. (*Vide infra* more of this, 29 *Martij* 1683.)

2<sup>do</sup>. (15 *Februarij* 1683.)—Sir John Dalrymple and Sir John Harper have both bills in to the Secret Counsell for ther liberation, but they are waved and delayed.

16 *Februarij* 1683.—At Exchequer, Sir Alexander Morison of Preston-<sup>No. 918,</sup>  
grange, having right from the Earle of Louthian to a part of the erection<sup>p. 304.</sup>  
of the Abbacy of Newbotle, is pershued for the few-dueties of his oune lands possessed by him in property, which they ware in use to pay to the Abbacy in the tyme of Popery, before the annexation of Kirk-lands to the Croun, and the erection theirow in a temporall Lordship. Answered, That the 14 A& of the Parliament held in 1633, making the King superior of all Kirk-lands, in compensation and reward to them who had voluntarily surrendred ther superiorities of ther kirk lands to the King, they got a right to the few-dueties of all the vassalls, ay till thesse few fermes were redeimed by payment of 1000 mks. the chalder; and it ware absurd he should have right to the few-dueties of other wassalls' lands, and not have right to retain his oune few-dueties of the lands he posselt in property himselfe, especially feing he was infest by the King, upon a charter bearing a blanch duety; and which was no læsion nor diminution to the Croun revenue, feing they may redeem when they will; and by confusion the superiority and property was consolidated. The King's Advocat opponed the said A& in 1633, wher the Lords of erection are appointed to pay the same few-dueties for ther properties that thesse Kirk-lands payed before the Reformation.

2. On the 23 of Februar 1683 this was decided, and found they could not retain ther oune few-dueties, but they behooved to pay them in to the Exchequer, which will be about 200 lb. Scots by year to Preston-grange; but he was not much concerned how it went; because he had reall warrandice in the Lordship of Newbotle to recur upon. This Inter-

locutor concerns many, and particularly Panmuir, for Arbroath Abbacy ; and my Lord Torphichen, whosse Temple-lands they inclined to find to be of the nature of other Kirk-lands, and in the same case ; (yet see the contrare of this in the Lawyers ther receaved opinion, in my summary compend I have befyde me of Bengesus and Pinsonius, ther *Tractat. de Beneficijs Ecclesiasticis* ;) but the Exchequer waved the decifion of it at this tyme.

No. 919, *Eodem die*.—At Exchequer, the Marquis of Athol, Vice-Admirall, had p. 305. a competition for the affise-herring of the Isles, formerly belonging to the Earle of Argile, and now clamed by Stuart, Shireff of Bute, as having a tack theirow from Argile cled with poffeffion, before the cryme for which he was forfaulted ; but it was contended it belonged to the Hy Admirall.

No. 922, 19 *Februarij* 1683.—At Criminall Court, one Meinzie is pannelled p. 305. for converfing with rebells, and it being proven againft him, (by the mif-manadgment of Sir D. Thoires, his advocat, as was reported,) that he had collected contribution money for thefe rebells in the Weft, and diftributed it ; and that he had receaved letters from Balfour of Kinloch, one of the Archbifchop of St. Andrews's murderers : The Juftices condemned him to be hanged : but it afterwards appearing thir witneffes ware infamous, and that they had fworne largely, and was delated by one who was owing him money ; the Privy Counfell reprieved him.

No. 924, 20 *Februarij* 1683.—Sir John Dalrymple (*de quo fupra pag.* 302) is p. 306. this day liberat from prifon by the Counfell on paying his fyne, Hew Wallace, cafhkeeper, having reported his difcharge, and upon a bill to the Counfell relating the fentence, and acknowledging his rafhneffe, and craving the Secret Counfell pardon.

No. 925, 21 *Februarij* 1683.—Aikman Lady Pitcairley, as executrix p. 306. to hir hufband, *contra* the Earle of Hadington, for ane account of writings and depurfements for the late Chancellor Rothes, which Hadinton had fubfcrived with this condition, "If the articles ware juft ;" and thee offering to inftitu& them by produ&tion of Pitcairlie's count book, wher they ware

all standing unfcored. The Lords, on Forret's report, fand the Earle's fubfcription not obligatory, unleffe they otherwayes proved the wrytings and depurfements; which they allowed hir to doe, by theffe that ware Mr. J. Bayne of Pitcairlie's fervants at the tyme.

21 *Februarij* 1683.—Earle of Leven and Mr. Francis Montgomery, (see them *supra* page 288,) who craved all the bygane rents and moveables of the Counteffe of Leven, as falling under his *jus mariti*, and that without being liable for the debt which was not eftablifhed againft him, nor the fecurity renued during the ftanding of the marriage. . . .

No. 926,  
p. 306.

Then for the jewells, it was alledged by Leven, They fell not under the *jus mariti*, but that each of them being a feperat fpecies or kind, they befell as airfhip to him as air. 2<sup>da</sup> For the great jewell, called the Jewell of the family, gifted to Alexander Leffly, firft Earle of Leven, (when a Generall in Germany,) by Guftavus Adolphus, King of Sweden, it was not only airfhip, but by his teftament, he had prohibited to alienat it *extra familiam*, but to remain as the jewell of the Houfe.

Answered for Mr. Francis, That in all the rolls of the Comifariot's airfhip moveable goods, none of them mentioned jewells; and the reafon was this, becaufe the reli& got them alwayes as hir *jocal a* and *paraphernalia*, 2<sup>da</sup> This is but a *nudum præceptum de non alienando*, which does not impede tranfmiffion, without ther ware a penalty, which is not heir. This fubtilty (which I am fure Earle Alexander never dreamed of) is founded in *L. 38, § 4, et l. 93, D. de Legatis*, 3<sup>da</sup>.

2. This great caufe was advifed on the 27 of Februar 1683, and the Lords fand, That the contra& of marriage betuen Mr. Francis and his lady could not be quarrelled on that pretence, that the lady was then minor.<sup>1</sup> . . . . Mr. Francis declined Colinton, on the late A& of Parliament 1681, againft unckles in affinity to be Judges, as weill as in confanguinity; for my Lord Melvill's mother was the prefent Lady Colinton's fifter, and fo he is hufband to Leven's grand-aunt. But Tarbet, Clerk-Regifter, fat, becaufe he is only coufin-german.

<sup>1</sup> [See the printed Decisions, vol. i. p. 220, for a full report of this case.]

3. The words of this Interlocutor, as it was dictated to the Clerk of the proceſſe, ware, “ The Lerds finds, That the great jewell, gifted by the King of Sweden, muſt belong to the family ; and that this jewell is the airſhip jewell ; and that the reſt of the jewells are not airſhip moveables ; and that the Counteſſe might diſpoſe on theſe jewells as being *paraphernalia* on deathbed, in prejudice of the air’s releiff againſt theſe jewells ; and finds that the air cannot be prejudged of his releiff by the diſcharge and diſpoſition given by hir on deathbed, and that the Counteſſe hir oath ratifieing the ſame is perſonall, and cannot prejudge the Earle of Leven hir air of his releiff againſt the ſame ; and finds that the *jus mariti* is not burdenable with the wife’s debts, but only *ſubſidiarie*, as a *remedium extraordinarium* after diſcuſſion of the wife’s hæretable and moveable eſtate, introduced in favors of creditors, that they may not be loſers ; and finds that Mr. Francis Montgomery muſt have the moveables purchaſſed with the 10,000 lb. not to be counted in the executry, and that the Earle of Leven ought to be free of the 10,000 lb. appointed and allowed by the ſaid contract for buying of moveables and furniture ; and finds that the Counteſſe, albeit a minor, might give a competent proviſion to hir huſband for his liſrent uſe, and might tranſact the courteſy ; and alſo finds the proviſion in favors of Mr. Francis in the contract of marriage was not exorbitant, and therfor they ſuſtained the ſame.

No. 927, 22 *Februarij* 1683.—In the ſpulzie of the teinds of Innerkeithing, per-  
p. 308. ſhued by the Earle of Tuedale againſt the Earle of Lauderdale ; the Lords, on Pitmedden’s report, before anſwer to the nullities objected againſt the tack given in 1641, to the Earle of Dumferling of the lordſhip of Dumfermeling, as ſet of the annext property, without a diſſolution prævious ; ordained Tuedale and the defender to count and reckon if Tuedale was payed of the ſummes for which he and his father was ingaged, as cautioner for the late Earle of Dumferling. This was to bring in my Lord Dumferling’s clame, who is now in court by marrieng Marquis Huntlie’s ſiſter.

No. 929, *Eodem die*.—Mr. John Strauchan, miniſter, and Sir Alexander Forbes  
p. 308. of Tolquhon’s cauſe being reported by Kemnay, the Lords fand Sir A.



Forbes had loft the cause, in regard *pendente lite* he had beat the perthuar; tho the beating arose on another quarrell, and not upon that proces; having only forced him to obey a caption against him, by keeping him on horseback; and that he had already payed 10,000 mks. of fyne imposed upon him by the Privy Counsell for that same fault, wheirof the said Minister had gotten 500 mks. for his expences; and *pænæ non debent acerbæ his exigi*; and they being both pænall, *non debent circa idem objectum concurrere*; and that the libell was for vicarage teinds, which in the wholle ware not worth 1000 mks., yet he had libelled 9000 mks. The Lords repelled all this, and decerned for the wholle.

22 *Februarij* 1683.—Sir Patrick Threipland having conveyened at No. 932, Privy Counsell, one Lundy and Glasfe, the late Provefts of Perth, for P. 309. calumniating him, and for ther malversations. It was alledged, It was *res hactenus judicata*. The Lords ordained the former sentence to be produced, that they might confider how far it was judged already.

2<sup>do</sup> Blaikwood is repreeved 2 moneths farder.

3<sup>do</sup> Meinzie (de quo *supra* 19 Februar) is recommended to the King for a pardon.

23 *Februarij* 1683.—His Majestie's Advocat's Declarator of Recogni- No. 933, tion against the creditors of Urquhart of Cromarty, was this day advised, P. 309. and decided. The Lords finds as to the first point, That alienations, tho without consent of the superior, yet if they be confirmed before the major part be annailized, can nather recognosce themselves, nor come *in computo* to make recognition as to any other lands. As to the 2<sup>d</sup> point, finds the confirmations after the major part is alienat, and before the gift of recognition, does secure themselves, but most come *in computo* to make up the major part for the recognoscing of what is not confirmed. As to the 3<sup>d</sup>, the Lords finds the Novo-damus does so secure against the recognition, that all the alienations before the Novo-damus cannot come *in computo* to make up the ground of the recognition. As to the 4<sup>t</sup>, the Lords finds, notwithstanding of the infestments, wheirupon recognition is craved, be likewayes in lands of different holdings, as holding few or blench, and

belonging to different heritors, yet they moſt be conſidered as a ground of recognition *quoad valorem* of the wholle ſummes wheirupon the infeftment was taken, without reſpect to the releiff which may be expected out of theſe other lands. As to the 5<sup>t</sup>, the Lords repells the alledgeance, that the infeftments ware in truſt as it's condeſcended on, viz., that they ware in the vaſſall's charter-kift, and that he retained the poſſeſſion; except the vaſſall's fraud and dole ware inſtrued, or that the gift ware to the vaſſall's behooff. To the 6<sup>t</sup>, the Lords repells the alledgeance founded upon the reſignation made by old Cromarty in favors of his ſone, albeit bearing a confirmation in what relates to rights made to the vaſſall, and not to rights made be the vaſſalls. 7<sup>o</sup> The Lords repells the alledgeance founded on the inhibitions prior to ſome of the grounds of the recognition. 8<sup>o</sup> They find the infeftments that ware *habili modo* extinguished before the concurſe of the major part alienate cannot come *in computo*. 9<sup>o</sup> They find that ſeaſines intrinſically null are not to be reſpected as a ground of recognition: but I think not—regiſtration of the ſeaſin within 60 dayes is not ſuch ane intrinſick nullity.

This, with John Hay of Muirie's caſe,<sup>1</sup> clears many debates that aroſe on Recognitions. But the 4<sup>t</sup> and 5<sup>t</sup> articles of this Interlocutor ware much complained of as hard and great ſtreatches of this odious caſualty of recognition. The 4<sup>t</sup>, becauſe if the infeftment be alſo furth of blench and few lands, why ſhould it be all caſt on upon the waired lands: only they ſay the vaſſall *fecit omne quod in ſe erat*, by giving it alſo out of the waired lands, and that it is likewayes out of others, does not diminifh the vaſſall's ingratitude and contempt of his ſuperior. The 5<sup>t</sup> was grudged at, ſeing ther can not be a more pregnant qualification of a truſt and a conveyance than to find a right in a debtor's charter-kift, which preſumes it payed and retired, or led to his behooff, unleſſe another way *quomodo* it came ther, by borrowing or ſtealling it, &c., can be condeſcended on, as in Ferguſſon and Seton of Carrifton's caſe in 1678.

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<sup>1</sup> [The ſeveral entries in Fountainhall's Manuscript, reſpecting this caſe of Hay of Muirie, are given in the printed Decisions, vol. i. pp. 119, 122, 131, 168, 225, 230, 248, and 301, during an interval of 4 years, from 27th November 1680, to 14th August 1684.]

24 *Februarij* 1683.—At night, by order from the Chancelor, Mr. Robert Blaikwood younger, merchand in Edinburgh, was, upon the delation of Cunyghame of Montgrenan, and Josias Johnston, imprisoned, as if he had receaved letters from the West country peeple, when in armes at Bothuel-bridge, and keepest correspondence with them in Holland, and remitted them bills. And one Hew Cunyghame, seized on for the same cause, was put under caution. No. 935,  
p. 310.

And on the 26 of Februar, the Privy Counsell met anent it, and about a field conventicle lately held at Drumclog, near Loudon hill.

*Primo Martij* 1683.—At Privy Counsell, ther are some letters from the King. 1<sup>st</sup> One to the Session, anent ther Commiffion for Argile's forfaitor, fuspending and retracting what was given to Argile's children, till they produce the charter-kift, to secure the Chancelor or others that shall get of his land; and till they reproduce some armes he borrowed from the publick; and ordains the charter-kift when produced, and Inneraray Castle, and the armes ther, to be secured; and declares he is resolved to provide for Lorne, &c., another way. No. 939,  
p. 310.

2<sup>nd</sup> A letter to the Justice Court, thanking them for ther pains they had taken in convicting William Laury of Blaikwood, for his countenancing of rebels, and approving of what they had done against him.

3<sup>rd</sup> A letter anent one (supposed to be the Bischop of Edinburgh) who had undertaken to wryt his Majestie's Father's life, and for his discouragement, he is promised a reward.

6 *Martij* 1683.—The Earle of Lauderdale gave in a bill to the Lords, craving that they might allow the Lyon King-at-armes to grant some allowance in the funerall pomp of the Duke of Lauderdale, notwithstanding of the restrictions in the late Act of Parliament in 1681, in regard he had been oft his Majestie's Commiffioner, and borne the greatest characters and imployes of a subje&; at leift that they would explain the said Act of Parliament, which was confused and unclear. The Lords referred it to the Privy Counsell; but thought they could not dispense with the Act of Parliament. No. 941,  
p. 311.

No. 943, 8 *Martij* 1683.—The dyet for the Lady Stairs appearance being this  
p. 311. day, shee gave in a bill, promising to leave orderly and regularly in tyme coming ; and desiring they might passe hir bygane faults in absenting hirselfe from the church, or in being present at conventicles ; and that shee would plead nothing on the informality of hir citation, shee being cited on 60 dayes, as furth of the country, wheiras shee was all the while within it. The Lords of Privy Counsell ordained hir to be cited of new again.

No. 954, 13 & 14 *Martij* 1683.—Sir John Seton of Garmilton, and Sir Robert  
p. 312. Sinclar of Stevinson. The Lords fand Gar[m]ilton could have no other servitude on Stevinson's land for his milne damme, save what hes been in possession of, and affoilzied Stevinson from dammages : this having been done in the afternoon in the Chancellor's absence, he was dissatisfied theirwith. (See more, *infra pag.* 320, at the 30 of March 1683.)

No. 955, *Eodem* 14 *Martij* 1683.—Ludovick Spence against Sir William Sharp  
p. 312. and Mr. James Scot, Shireff-Clerk of Edinburgh, reported by Colinton ; the Lords affoilzied Mr. James Scot, as not being debtor to Sir Francis Ruthven, but to the King's Majesty and his Cashkeeper, as to that fyne imposed on Sir Patrick Hepburne of Black Castle, for harboring Mr. Gabriel Semple, ane phanatick minister, and which was gifted to Sir Francis : And also affoilzied Sir William Sharp, he being countable onlie to the King and the Lords of the Treasury for that money ; tho it was alledged, from *Damhouderij praxis Criminalis, cap.* 83, that *militare stipendium*, especially such donatives as thir, ware arreistable, and not of an alimentary nature.

No. 957, 15 *Martij* 1683.—Mr. James Pilans's bill against Sir James Turner  
p. 313. (*de quo supra pag.* 283, *et seq.*) was this day refused, and the Lords adhered to ther former Interlocutor.

No. 961, 15 *Martij* 1683.—At Privy Counsell, George Gordon, bailzie to Irving  
p. 313. of Drum, pershues Roffe younger of Auchlossan for oppression and vio-

lence. Alledged, He being one of the Hyland Justiciary, required his concurrence to apprehend a nottor theiff. The libell was admitted to probation.

2<sup>do</sup>. The Earle of Kincarn's [Kincardine's] creditors gets his charter-kift sequestrat, and depositat in the Lords of Session's custody.

3<sup>do</sup>. Mr. John Philp (*de quo supra* page 297) is this day fyned in 2000 lb. sterling, or 36,000 mks., for calling the Duke of York "A bloody tyrant;" and is sent to the Basse till he pay it; and to lay ther even after the payment of it, during the Counsell's pleasure: And the Lords declared, if he had not once been a Minister, they would have remitted him to the Criminall Court for his life; as also they recommended to him more sobriety, and to forbear drinking, (for it was in cups, and his *compotores* delated him;) and certified him, if he did not pay it, or give sufficient security and assignations to bonds, within 15 dayes, they would ordaine the King's Advocat to pershue him criminally; and declared him infamous, and never capable of preaching heirafter. This was a deep fyne; but he made no use of the estate God had given him.

In the action pershued by Robert Hamilton of Presmennan, as collector No. 962, to the Lords of the Session of ther rents and taxation, against the Vicount P. 314. of Oxenford, it being advised, the Lords assoilzied Oxford, in respect of the discharge given to his father by the Lords of Session; and fand no circumvention; (it ware a shame to confesse the Lords had been cheated;) and that Mr. Robert Hodge and the other sub-collectors being put in by the Lords, and not by him, he was not liable for them; (yet *vide supra* Halton's case of the Mint, 20 Januar 1683, page 293;) but in regard ther was an error *in calculo* of 1000 lb. and 600 lb. Scots founded on, they referred it to my Lord Pitmedden, to calculat and discusse it; and fand the defender's father might retain of ther rents his oun 15<sup>t</sup> part, as one of the Lords of the Session, thosse years that he and others ware put out *de facto* (and not *de jure*) by the usurpers betuen 1651 and 1660, tho he did not serve for it. This Session it was observed, that the Chancellor and Lords of the Session clenged ther hands of many causes that had long depended, as Brughton's falsehood and this, which Stairs would

never decide ; and now *in odium* of him, the Lords determines against themselves.

No. 967, 20 *Martij* 1683.—At Privy Counsell, John Fleiming, factor at Rotterdam, being one of them that was cited among the fugitive Scots ther to appear, gave in a bill, with a recommendation of him, in Latin, from the States of Rotterdam, that he was none of the countenancers of the late Archbishop of St. Andrew's murderers. The Privy Counsell appointed the King's Advocat to draw an answer for them in Latin, telling, that at their desire they had discharged him of the editall citation given him at the mercat croffe of Edinburgh, and pear and shore of Leith, in respect fundry merchands in Edinburgh ware ready to declare and attest his loyalty. (*Vide infra* 2<sup>d</sup> Aprill.)

No. 968, 20 *Martij* 1683.—Grahame Bishop of the Isles against Mr. John Stewart of Afcog, Advocat. The Lords fand the Bishop hath right to the rentall bolls conforme to the first assumption ; and tho the tack be in 1606, when Bishops ware, by A& of Parliament then standing, allowed to set long tacks, yet being after the A& of Parliament in 1585, discharging any conversion of victuall unto money, they find the Church lased by the smalnes of the price in the conversion, and therfor reduces the tack. This is a leading case, and opens the door to the reduction of many such tacks. (See my 4<sup>th</sup> Manuscript, marked A. 7, page 61.) The Bishops are now talking, that when the Parliament shall sit, they would have an A& of Parliament, binding them up, that they may not set tacks of ther teyndes for 19 years, (to wrong the nixt successor,) but only during ther lifytymes as other inferior clergymen doe, that thesse casualties may not be forstalled, and given away from the nixt incumbent who may not outlive the expiration of that tack set by his predecessor : but at this rate few would take tacks from them ; at leift would give them little or nothing for greffums and entries of so uncertain a tack. However, ere long the tacks of many teyndes will fall throw Scotland, tho set for many 19 years before the restraining A& in 1617, and then they will ather [fall] in the hands of the kirkmen, or of the Titulars and Lords of erec-

tion. (See the folio Law Manuscript A. 7, *Julij* 1677, Sheill, minifter at Prestonhaugh, againft Sir Andrew Ramfay and others, folio 292.)

Sir G. Lockhart exclaimed much againft this decifion. Thir long tacks of teinds ware invented, becaufe teinds, after the Lateran Counfell, might not be perpetually given away in feu, as being *juris facri et divini*; and it's wondered, how the laymen confented to the abridging the clergie's illimited power in fetting fuch tacks.

20 & 21 *Martij* 1683.—Kennedy of Collain and Broun of Thorniedyks<sup>No. 969, p. 315.</sup> are imprifoned for fighting together in the Parliament Cloffe. (See *infra* page 319.)

22 *Martij* 1683.—The Earle of Tuedale charger againft the tennents<sup>No. 975, p. 316.</sup> of Pinky, reported by Boyne; the Lords finds the letters orderly proceeded, and fustains the Comifars of Edinburgh's decreet in refpect of the probation, and the [17<sup>th</sup>] A& of Parliament in 1633, modifieng the teind to the 5<sup>t</sup> part; (yet that A& was mainly for heritors and titulars, and not for mafters and tennents;) and tho they ware really damnified by that low valuation, (the 4<sup>t</sup> part being the true intrinfick value,) yet they had ane eafe by the overrunning of the mettage of ther aikers, and ware free of the expence they would have been put to of leading away ther ounne teind.

*Eodem die*.—The Earle of Tuedale, Lord and Lady Yefter's exhibition<sup>No. 976, p. 316.</sup> *ad deliberandum* againft the Dutcheffe of Lauderdale and the Earle theirof, being reported by \_\_\_\_\_, the Lords fand the Duke of Lauderdale's tailzies (tho no infeftment be yet taken theiron) fufficient to exclude any farder produktion for infpektion; as alfo that the faid late Duke's difpofition of Leidington, &c., to the Dutcheffe, cuts of the Lady Yefter's title of appearand air of line to hir father, or of calling for any farder produktion *quoad* theffe lands; and for hir renunciation, if it was generall of hir very hability and capacity to fucceid, of the *fpes fucceffionis*, then fand it debarred hir from perfhuing *ad deliberandum*; but if it related to the jewells or other particulars only, then fand it did not exclude hir from this aktion.

No. 978, 22 *Martij* 1683.—At Privy Counsell, Auchlossan (*de quo supra* p. 317. *pag.* 313, *in fine*) is affoilzied from the libell; but ordained to pay the pershuar's witnesses' expences; which was thought a somewhat strange inconstancy.

2<sup>do</sup>. Mr. James Cunyghame, wryter, being pershued by the Lady for a ryot, the Lords fand, he had lawfully poinded them, yet ordained him to restore them as hir habiliments: the 2 parts of this Interloquitor was also judged contradictory.

No. 979, *Eodem die*.—Dunfermeling and Calander's case debated at Session p. 317. upon the debts Calander gave in to diminish and abate the conquest proven; (*vide supra pag.* 252;) and Glorat's debt was refused to be allowed, because they wanted the bond, tho they produced a comprising led on it, with a renuntiation of it, which they (with Dumfermeling's moyen by Huntly now his brother-in-law) would not sustain as a sufficient probation, but adhæred to ther former Interlocutor, which was very hard.

No. 980, 22 *Martij* 1683.—At Privy Counsell, Blaikwood's day of execution is p. 317. continued till the 24 of November; and Wilky, Comisar of Lanrick, is liberat.

2<sup>do</sup>. Sir James Cockburne pershues one Ancrum, a fever of his in Duncce, for vitiating a charter, and razing out a clause adjected to it by way of postscript, excepting the property of a yeard out of it, which yeard had been insert in the body of the charter; and he had scraped it of the parchment with a knife. The Counsell, tho it was a cheat, yet referred it to the Session, because it concerned the tryall of a falsehood in point of property. Ancrum alledged, Cockburne had homologat that charter and his right to the yeard, by discharging the few duety of the yeard. The Lords ordained him, before answer, to produce thesse discharges. (*Vide more, infra pag.* 320.)

No. 985, 27 *Martij* 1683.—One Maxwell, bailzie in Paislay, is pershued for p. 318. using and producing a false protection, as if it ware under the King



and the Earle of Murraye's hand. He pretended he gave in to the Clerks of the Counsell a true protection, and that some had abstracted it, and given him back this protection; but the witnesses deponed the clear contrarie.

28 *Martij* 1683.—[James] Laury, the nottar and proctor-fiscall in No. 988, Lanrick, (who escaped out of the hands of the sojors guarding him to the p. 318. Criminall Court, but was retaken,) is sentenced to be hanged on the 4<sup>t</sup> of Aprill; for he was defaulted already in absence, in March 1681, for being with the rebels at Bothuel-bridge: but in regard he offered himselfe ready to make all submisſe acknowledgement of the Government, they repreeved him to the [3<sup>d</sup>] day of November nixt.

29 *Martij* 1683.—Sir Robert Murray (*vide supra pag.* 303) gives in a No. 989, bill to the Lords craving, that in regard the Judges in Ireland did not p. 318. respe& decreets written on paper without sealls, that they would allow his decret against Brughton to be drawn up upon parchment, and the seall of the Colledge of Justice appended theirto, and to be abbreviated, that one skin might hold it. The Lords refused to abridge it; but appointed it to be written in parchment by way of book, and ther seall appended to it.

29 *Martij* 1683.—At Privy Counsell, Mr. Irving, minister at Inner- No. 991, keithing, and Mr. Napier, pershue Stuart of Rossyth, Fergusson, p. 318. bailzie ther, and Mr. Malcolme Moulin, scoolmaster ther, for extorting the subscription of wryts from ane old woman ther, called Drummond, when shee was dying; and for imprifoning the Minister, who had become cautioner in a lawborrows; and for fundry other ryots. The libell is admitted to probation. (*Vide infra 12 Aprilis.*)

2<sup>do</sup>. Thorniedykes pershues Collain (*de quo supra pag.* 315) for affaulting and wounding him, and referred it to his oath. It was remitted to a committee, who fetled the parties; and this will move the Privy Counsell to deall more gently with them, in inflicting the *vindicta publica* upon them.

3<sup>uo</sup>. The Earle of Winton and Lady Carnwath perfhue Barbara Burnet, Do&tor Levifton's reli&, for delivery of ther papers lying in his hands. The Lords fand they would be fparing to force exhibitions ther ; but would remit them to the Judge Ordinar : yet they ordained it in this cafe, in refpe& of the circumftances, that the Do&tor had been the Earle's fervant, and had a great truft of his papers, and dyed by a fudden and unexpected event, (being drowned in York's fhipwreck, May 1682,) ere he could order them ; and therfor ordained the wholle papers to be produced and inventared, as weell the Do&tor's as the Earle's, and that upon oath, before Lundy and Abotshall ; and referved all defences againft delivery, ather upon debts owing to the Do&tor, or otherwayes.

No. 992, 30 *Martij* 1683.—Vicount Granard, Lady Logy, and Lady Berfoot, p. 319. againft George Seton of Barns, being advifed by the Lords, they fand, (*vide* thir parties *supra* pag. 301,) by the wrytes produced, the depofition of Mr. Robert Hodge of Waft Gladfmuir, the arbiter and wryter of the minut of the decreet arbitrall, and the comifars, ther clerks and fervants, and particularly by the oaths of Home and Sandy, that the faid decreet at the beginning hes borne *his eftate*, and is fince made *this* eftate, by adding the letter *t* to *his* in 2 places of it, wher Sir John Seton his father is impowered to difpofe upon the reft of his eftate ; and that it hes no other vitiation in it, and that it appears that Barns, nather by himfelfe nor others, had any acceffion theirto. Barns in this proces, to blunt Lady Margaret Hay, his stepmother's proces by the popifh priests, agreed with hir ; yet the ennemies he left behind prevailed this far, as we have feen, which they fought to counterballance and enervat Barns's fuit he had commenced in Ireland, for fome lands ther belonging to his father, wher they made ufe of the forfaid decreet arbitrall as a renuntiation of all he had to crave, fave the lands of Barns.

No. 993, 30 *Martij* 1683.—Bailzie of Torwoodhead againft Hew Wallace and p. 319. Edward Ruthven. (*Vide supra* pag. 281.) The Lords repones Torwoodhead as the nixt air of tailzie to umquhile James Lord Forrefter, into the poffeffion of the houfe, yeards, and parks of Corftorphin, but

prejudice of Hew Wallace's comprifings their of; which are referved as accords till count and reckoning.

*Eodem* 30 *Martij* 1683.—At Exchequer, Captain Thomas Hamilton, No. 996,  
merchand in Edinburgh, perfhues Fleeming, Dick, and the other Magif-  
trats their of, to produce ther books and Treafurer's accounts upon oath, p. 319.  
that the Hy Treafurer may fee if they have applyed the patrimonie and  
common good of the brugh to neceffary and profitable ufes. The Magif-  
trats, and Sir James Rocheid ther Clerk, being ftartled at this, they raife  
the like fummons againft Sir Andrew Ramsay, and all that had borne  
office in Edinburgh fince 1653. After great heat betuen the Chancelor  
and Treafurer, the Exchequer refused to fustain proces at privat bur-  
gefles' instance, (fo as to make it *actio vere popularis*,) that looking too  
popular and democrattick, like Thomas Anello in Naples, or Count  
Tekely's mutinie now in Hungary; but fand, by the 36 A& of the Par-  
liament held in 1491, James 4<sup>t</sup>, and A& 25, James 5<sup>t</sup>, in 1535, the Hy  
Treafurer, (as come in place of the old Chamberlain and his Aire,) may  
call any brugh to ane account how they fpend ther common good; and  
therfor ordained the Magiftrats, againft the 9<sup>t</sup> of April nixt, to exhibite  
and produce before him ther books, and he would infpe& them, and take  
notice of any helps or informations fhould be given him by citizens or  
others their upon; and fustained this fummonds, at leift as ane intimation  
by the inhabitants to the Magiftrats, to fatiffy them how they have im-  
ployed fo waft a yeirlie common good, conforme to the words of the faid  
25<sup>t</sup> A&. But it was urged, for privat men to perfhue fuch a&ions, was  
to allow them to perfhue Officers of State, which is *mali exempli*; (fee the  
popular a&ion perfhued againft Abotshall in 1673, in the Manuscript A.  
folio 166, &c., *ubi multa pulchra de Syndicata*;) and Sir John Dalrymple  
was lately threatned with a perfhuit of perjurie, that having sworne the  
Teft, yet he ftill offered to medle in matters of State, by attempting to  
accufe Claveris of exa&ing free quarters; that only belonging to the King  
and his Minifters to quarrell; and it was not thought fit to discouradge all  
taking of money from brughs for doing them good offices. Yet, in 1664,  
I find Mr. Patrick Oliphant was allowed to accufe Sir John Fletcher,

King's Advocat. This proces was designed to expiscat what brybes had been given to Minifters of State, or the Duchesse of Lauderdale, or others, which the Treafurer called The myftery of iniquity, which behooved to be discovered. (*Vide infra pag.* 329, anent the new Magiftrats of Edinburgh ; and Manuscript, A. 13, page 83, at Aprill 1684.)

No. 997, *Eodem* 30 Martij 1683.—Garmilton and Stevinfon. (*Vide supra pag.* 312.) The Chancelor caufed the Lords alter ther Interlocutor, and find Stevinfon lyable to refund and make up Garmilton's dammage, that the water ran not towards his milne as it was wont to doe ; tho all the fervitude that Stevinfon owed him in law was only a *nuda patientia* throw his ground ; and that the channell of the water was diverted *casu* and by fpeet, without any fact or deed on Stevinfon's part, and could not be returned to its former channell.

No. 998, 2 Aprilis 1683.—At the Criminall Court, Robert Hamilton, (Preston's brother,) generall to the Whigs, Balfour of Kinloch, and other fugitives living in Rotterdam, cited to appear in 60 dayes, (*supra pag.* 297,) are forfaulted in abfence. James Stewart, advocat, and others, are denounced fugitives only. And *quoad* a 3<sup>d</sup> fort of them, the dyet is continued.

No. 999, 3 Aprilis 1683.—At Privy Counsell, Ancrum (*de quo supra pag.* 317) is fyned in 100 lb. fterling for vitiating Cockburne's charter. For the Seffion having tryed the cheat, referred the punishment back to the Counsell.

No. 1000, 7 Aprilis 1683.—Argyle's creditors are ranked by the Lords, by vertue of the King's Commiffion to them (*vide supra* of this, page 310 : *Item, infra* in September 1683, page 330) to that effect. The Hofpittalls of Heriot in Edinburgh and of Stirling, are placed 1<sup>o</sup> loco, for both ther principall fummes and annuelrents ; fuch creditors as ather have fuffered, or been eminent, for ther loyalty, are ranked 2<sup>da</sup> loco, and they get ther principall fummes ; and the reft 3<sup>a</sup> loco, for the halfe of ther principall fummes, and no more ; and this to be payed out of his lands when fold ; and in the meantyme, by the Chamberlain's uplifters of the rent.

9 *Aprilis* 1683.—At the Criminal Court, Mr. John Somervell, minister at Cramond, pershues a woman for defamation of him, in affirming before the Presbytrie, that when shee was his servant, he had 5 or 6 severall tymes attempted to debauch hir, and ly with hir, and told hir that he knew it was not such a fin as it was called; but shee had alwayes re-sifted him. The dyet continued.

No. 1001,  
p. 320.

10 *Aprilis* 1683.—At Privy Counsell, ther is a letter from the King, procured by the Chancelor, that Mr. George Bannerman, Advocat, he adjoyned as his Majestie's Solicitor with Sir William Purves; tho Sir William's gift boor to Sir William and his sone, and the longest liver of them two; and he adhæred to his right, and the Treasurer syded him.

No. 1002,  
p. 320.

2<sup>da</sup>. Another letter, That Castlehill be one of the Criminall Lords, in place of my Lord Nairne, whom the King thought fit to excuse, in respect of his infirmity and age. This provoked the old man to reflect, that when he was lying in the Tower for the King, Castlehill was then one of Oliver Cromvell's pages and servants. And Nairne dyed within 6 weeks after this.—Castlehill had been one of the Justices before, but was deprived in November 1678, upon a caprice of my Lord Lauderdale, who said, Castlehill could hang none without ther oune consent; and Harcous was then, by the Duchesse, put in in his place.

3<sup>da</sup>. The King's letter was red about the Circuit, and the Indemnity to thosse commons that would take the Test, (which see in print;) and theiron Sir Jo[hn] Harper and Mr. Jo[hn] Meinzie were released on caution of 1000 lb. sterling to appear when called.

4<sup>da</sup>. A new commiffion to the Hy-Treasurer to manadge all the Excise of Scotland, at his pleasure, and to take the profit theirol (if their be any) above the 40,000 lb. sterling per annum due to the King, and the particular quota and proportion of it due furth of every shire, as it is adjusted and laid on by the [14<sup>th</sup>] A& of Parliament in 1661, and apply the excresce to the King's use; this will make it far exceed the 40,000 lb. sterling per annum.—James Hamilton and the brewars' proces (*supra* page 263) against Sir James Dick, Magnus Prince, and the tacksmen of the Excise of Edinburgh, and his offering to prove what exorbitant

gainers they ware by it, gave rise to demand this warrant and commission from the King; but otherways, it is ane arbitrary incroachment upon the people, contrare to ther designe in giving the said Excise; but this now should free the Commissioners of Excise from being subsidarie bound as to such shires and brughs which the King and his Treasurer shall assume in his owne hand, and set to tacksmen or collectors.

5. Notwithstanding the opposition the Towne of Edinburgh made to this, yet on the 12 of Aprill 1683, this Commission was past in Exchequer, empowering the Treasurer and Treasurer-Depute wher, in any shires or brughs in Scotland, advantage hes been made (above the quota established) in ferming the Excise, and allowing them to assume thesse brughs and shires, and to annex that profit to the King's Treasury, (they thinking it as rationall, since the people payed it, that the King should get it, as to see it pocketed by private men; but the true way was to have made the case accresce to the people,) and particularly the Towne of Edinburgh; (for in many places ther is deficiency and losse made up by a cesse on the land-rent, ther is so far from being any excresce;) and appoints the Excise and imposition to be set by his Treasurer joyntly with that of Mid and Eist Lothian, (for by a bond of union they are conjoynd, and if it ware broke, Eist Lothian's Excise and brewing would fall exceedingly short, but is made up by the triple conjunction,) they paying in to the Towne of Edinburgh the tack-duety they have been in use to get for it thesse years bygane, viz., ; so that if ther be any profit to be made above that tack-duety, that the same may come in to his Majestie's use. And accordingly Hew Wallace, cashkeeper, intimated it to the Magistrats of Edinburgh, by way of instrument, that the Treasurer designed to assume ther Excise and imposition, and required them to concur; which they at first refused, but at last yeilded to ratify the tack of it he had set to Sir John Young of Leny. This was lookt upon as a great inversion and innovation of that establishment of the Excise, made by the 14 A&t of Parliament in 1661, and the [12<sup>th</sup>] A&t anent the Customes and Excise in the Parliament 1669; so that by this, the King, who only formerly had a grant from the Parliament of ane annuity

out of the Excise of 40,000 lb. sterling by year, may make 60,000 lb. sterling per annum of it, which is an indirect imposing and leavieng of money without authority of Parliament ; and tho the King now seizes on it as *ad hoc caducum et nullius*, yet the ease and abatement should in law redound to the Brewars ; so that if one mark per boll should compleitly make up the King's quota of 40,000 lb. sterling, their should be no more exacted : But the Hy-Treasurer and our other Statesmen are resolved to make up a stock of money, to forward the Duke of York's affairs, when he shall succeid to the croun.

6. And upon considering the [8<sup>th</sup>] A& of Parliament in 1681, it occurs, that the continuation given ther of the Excise for 5 years to the King's succeffor, is not of the 40,000 lb. sterling by year, but seemes to be of the 2 marks per boll, and the haille Excise of the brewing of the kingdome ; (which certainly was not the Parliament's meaning to give any more but what the King presently possesses ; but hes been brought in by surprize, and past inadvertently ;) for, at this rate, it will come to a 3<sup>d</sup> part more, and will be 60,000 lb. sterling a year, yea it will be 80,000 lb. sterling per annum, if it shall be enacted for noblemen, gentlemen, and private persons' brewings for the use of ther ounne families, and not to tap, retail, or sell out again ; and yet the said A& will reach this, tho it was nather meant nor noticed by the Parliament 1681, when they past that A&. All can be said is this, that in the narrative, it relates to the fundamentall A& in 1661, giving the King not the wholle Excise, but only ane annuity of 40,000 lb. sterling yearly out of that subje& matter.

7. *Eodem 10 die Aprilis*.—Sir William Bruce of Stanop's sone pershues the lady Kirkland, his father's reli&, for ane aliment, as lif-renting the most part of his estate : the Privy Counsell remitted it to the Judge Ordinar, viz., the Session's. So this point of restri&ing lif-renters they keep it arbitrary to doe, or not doe, as they favor the parties. (*Vide supra* Craigintinnie's case, pag. 192.)

12 *Aprilis* 1683.—The proclamation for the Circuit Criminall Courts going throw the Westren parts ; see it in print. No. 1003,  
p. 322.

*Item*, The Minister of Inverkeything's case (*vide supra* pag. 318, in

*fine*) is advifed, and the Lords fyned Roffyth in 500 mks. ; and ordained Mr. Naper to be repoffeft ; and if any thing be imbezilled or abftracted, that Roffyth fhall be liable in reftitution of the triple of it.

No. 1004, 19 *Aprilis* 1683.—The A& of Privy Counfell is made for regiftrating prote&ions (*vide fupra pag.* 215) that paffes the King's hands, becaufe p. 322. fome (as one Maxwell, *fupra*) had adventured to falſify them.

2<sup>do</sup>. Strowan Robertſone's A& in favors of his timber flots, caft away coming doune the rivers of Tay or Erne ; and his ſaw milnes ; and for repairing the hy wayes from his woods to St. Johnſton.

No. 1005, *Primo Maij* 1683.—At Privy Counfell, one Andrew Jaffray, a pedlar, p. 322. perſhues George Foord, litſter in Dalkeith, for wounding him, and robbing him of his pack. Admitted to probation.

2<sup>do</sup>. The heritors of Liberton pariſh perſhue Mr. Ninian Paterſon, the late Miniſter, for delivery up [of] the Kirk Bible, ther poor's money, and the communion cups, with the keyes of the manſe. It's referred to the Biſhop of Edinburgh ; and if they [he] cannot agree them, then ordains him to be charged with horning to deliver them up.

No. 1006, 10 *Maij* 1683.—*Supra* page 295, we ſee the decreet of Seſſion againſt p. 322. Lauderdale and the other Officers of the Mint. Now we come to ſee why the Chancellor took all this pains to make them guilty : for this day is ther a letter red at Privy Counfell and Exchequer, bearing the finall ſentence and determination he gave furth againſt the Officers of the Mint, gifting moſt of it to the Chancellor, viz., That wher his Advocat having obtained a decreet againſt them before the Lords of Seſſion for 72,000 lb. ſterling ; and he minding the eminent ſervices he hath receaved from his late Generall of the Mint, now E[arle] of Lauderdale, therfor he mitigats the ſentence againſt them, and finds him only liable in 20,000 lb. ſterling for his part of it ; wheirof 16,000 lb. ſterling the King gifts to his Chancellor, and 4000 lb. ſterling to Grahame of Claverhouſe ; with this declaration, that if Lauderdale and his ſone the Lord Juſtice-Clerk ſhall diſpoſe the lands and lordſhip of Dundee and Dudhope (which the King had



gifted him the *ultimus hæres*, waird, marriage and recognition of, 11 years ago,) in favors of the Chancelor, then he shall be free of the forsaide summe of 20,000 lb. sterling, providing he give reall warrandice out of other lands, and against all the late Earle of Dundie's creditors, or ther consents; and that it contain all within 10 miles of Dundy, (so that Glaftrie and Innerkeithen falls not under it;) and that Claverhouse shall have power to redeem the house, yeards and parks of Dudhope, with the constabulary of Dundy, and all its emoluments, from the Chancelor at 20 years purchasse, (which some valued worth 30 years, because of the great dependance and superiority.) And as to Sir John Falconer late Master, the King fined him (this was in a separate letter from the former) in 4 years and a halfe's full rent of his wholle estate, both personall and reall, befyde the bullion in his hand he was yet resting:—He was made so easie, because they had privatly forced him to give his brother, David Falconer, a bond of 9000 mks. And decerned Mr. James Falconer, the late Warden's son, and Alexander Maitland the late Counter-warden, in 6 years' rent of ther wholle fortunes; tho ther was no passive titles proven against the 1<sup>st</sup>, and not so much as a decreet against the 2<sup>d</sup>. This arbitrary way was taken with thir two, because Mr. James's father having hanged himselfe, (as was reported,) his son refused to pay any composition to the Treasurer for his escheat, shewing a right he had long prior to lif-rent and all, denuding his father, and much debt on it: And it was to force the 2<sup>d</sup> to dimit his place of maiffery.<sup>1</sup> It was said, the fynes of thir 3 last ware given to the 2 Scots Secretaries.—This was a miserable reverse of fortune upon my Lord Lauderdale, for all his services, (see morall Observes on this, *alibi*,) and a great document to all Statfmen of the lubricity and instability of ther offices; and it was no wonder to see the Lords' unwarrantable and illegall decreet restricted, they having decided *supra* some very od and irregular points in it: but it matters not whither

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<sup>1</sup> On reading of this Letter, I found it likewayes commanded the E[arle] of Lauderdale to discharge any releiff he clamed or had of recurring against Sir John Falconer as Master, or the other inferior officers of the Mint; which was procured by the Lady Erroll and President Newton, for his father Glenfarquhar, and hir brother Southesque, ware cautioners for Sir John Falconer's administration, and they feared it might at the long run land upon them. (Marg. Note in MS.)

a greater or a lesser fyne break one, if one, or any one of them accables and ruins us. He who procured letters from the King against others, is now *justo Dei judicio* used with the same measure as the Earle of Morton, who brought home the heading Maiden to Scotland. If the King, or Parliament, or Justice Court would, in an arbitrary way, (which if pardonable in any case, would be heir) forfault the Dutcheffe of Lauderdale for treasonable reviling the King, as ungrate to hir and hir Lord, or on other grounds retrinch hir of some of that land shee by circumvention got from hir husband, and give it to Halton, it would be some reparation. (*Vide* anent closing up the Mint, *infra* 4 Julie 1683, *pag.* 326.)

2. In August 1683, the Chancellor and Lauderdale agrees; and so he reaps the fruit of all this pains he had tane in carrieng on a decreet and fyne for his oun use; he accepts of the halfe, viz., 8000 lb. sterling, or 100,000 lb. Scots, and 20,000 lb. Scots farder when they shall be able, and wheiron they gave him Sir William Sharp, Cockburne, &c., cautioners; and having gotten an assignation to the Chancellor's right, they offered to Claverhouse (who repented the Chancellor's transacting for himselfe, and deserting him and entring in freindship with Halton) the house, yards and old park of Dudhop, with the constabulary of Dundy for 20 years purchasse, as he was to have payed to the Chancellor, in whose place they ware come; and they being debtors *alternative* in 4000 lb. sterling, or that offer, they elected this last; which he declined to accept:—So the freindship betuen the Chancellor and Claveris, bottomed on interest, heir falls afunder.

No. 1007,  
p. 323.

*Eodem mense Maio* 1683.—Ther is a letter from the King anent the Castle of Stirling, that it be viewed, and a plan of the fortification therof taken; and an insinuation that the Earle of Mar (whose ancestors have had the keeping of it these 3 or 400 years, as also once of Edinburgh and Dumbarton Castles,) may sell the government of it to the King, that he may place whom he will; and that Mar keep the money-rent of the lordship belonging therto, till he count and reckon anent the summes are owing him by the King; and that the vi&uall-rent of it be annexed and

brought in to the Exchequer. The defigne of this was to put it in the Chancellor's hands and keeping, as a strong paffe and key betuen the Lowlands and the Hylands ; according to the old motto about the armes of Stirling anent ther bridge,

I am a passe, as travellers doe ken,  
To Scottish, British, and to Englishmen ;

It standing with many hills befyde it ; which made the Abbots and Monks of Cambuskenneth neir it, and King James the 6<sup>th</sup> (who, and many of his predeceffors, ware bred ther in ther infancy) to observe, that the wind and weit met once a day at the croffe of Stirling. Forth there hes many crooks, Alloway being 24 miles by water from Stirling, and only 4 by land : So that it's a byword,

The lands in the crooks of Forth  
Are worth ane Earle[dom] in the North.

And to force Mar to quite his superiorities in Kildrummie and the Brae of Mar to the Marquis of Huntly, (that so he might be sole in the North, Argile being broke, and Seaforth ready to compone for his superiorities ther,) Mar's command and dependance being larger than the Marquiffes ; and all thir hy attempts of the Chancellor ware done, tho Mar had freely discharged him the holding of Haddo, by which he was bound to ryde with him, and furnish 4 men (archers), and resigned it, that he might immediatly hold it of the King. But Mar having showen his rights, they fand his hæretable keeping of Stirling Castle both ane ancient and valid right.

*Eodem tempore mense Maio* 1683.—A fojor is hanged for killing a No. 1008, scelaiter, it being *delictum commune*, and not *militare*, and so was judged <sup>p. 323.</sup> by the Toune of Edinburgh.

*Item*, One [John] Wilfon was hanged for being at Bothuel-bridge.

22 & 24 *Maij* 1683.—Claverhouse is admitted a Privy Councillor. No. 1009,

2<sup>da</sup> John Forrefter pershues John Forbes of Cullodin for oppressing <sup>p. 323.</sup> the shire, in exacting and collecting the Excise ; *item*, for poinding him illegally. The Lord Doun and others violently partyed Foster : It was

committed with a prospe& to a settlement ; but on the 24 of May, the Counsell fyned Cullodin and the other Commiffioners of the Excise in 900 mks.

3<sup>th</sup>. The officers of the Militia in the westren shires gave in a petition, bearing, that by former A&s of Counsell, they had been difarmed, and discharged to have a horfe above 5 lb. sterling ; and now they being again pleased to call them out again, they could not put themselves in readines against the dayes of the muster mentioned in the Counsell's last proclamation, and therfor craved a farder day for ther rendezvous ; which was granted.

No. 1010, 4 *Junij* 1683.—There are 2 A&s of Privy Counsell made ; the one, p. 324. against keeping chaplains and pedagogues, who had not tane the Test, under the borrowed names of phyfitians, chamberlains, or servants. The 2<sup>d</sup> was, against misapplying mortifications for hy-wayes, and nominating overfiers for hy-wayes, bridges, and ferries.

No. 1011, 5 *Junij* 1683, *et diebus sequentibus*.—The Circuit Court began at p. 324. Stirling, and on the 10<sup>t</sup> day at Glasgow, and so forward throw the other places. (In thir places the Justice-deputes went bareheaded as ushers to the Court before the Criminall Lords ; but they ware not oblidge to doe it.)—At Stirling, ther ware many small crymes, and dittayes had been taken up in the Porteous roll which I found was used in Italy.

1<sup>o</sup>. One is pershued for cursing his father : he confesses he called him a drunken dog : he is sentenced to enter in prifon in the tounne wher he dwelt, and not to come forth till the father interceeded at the Magistrats for him, and that he craved his father openly pardon : This was to uphold the 5<sup>t</sup> command.

2<sup>do</sup>. One is conveyned for having reviled the Minister, in causing the piper play *The Deill flick the Minister*. Sundry filders ware ther present as witneses, to declare it was the name of ane spring.

3<sup>th</sup>. Skeen of Halzeards, in Fyffe, is called for oppreffion and sacriledge, in applying money got at the Church door (which was the poor's) to pay a debt the bedell was owing him. The dyet deserted.

4<sup>th</sup>. A nottar is pannelled for inferting a false date in a seafin, to make it præferable. This continued ; because it was not yet improven before the Session.

5<sup>th</sup>. Many shireff-officers and messengers are delated for concussion and exactions of money to score men out of the roll ; and sometimes pretending they had warrands to cite them, when they had none.

6<sup>th</sup>. Mr. Nathaniell Fyffe, Shireff-depute of Perth, and John William-son his clerk, quarrelled for negligence and fraud in omitting to take up dittayes within the stewartry of Monteith, which is a part of ther shire ; (the proclamation was wrong pointed in this place.) They, according to the law of *Regiam Majestatem*, and *Quoniam Attach.*, ware laid over to the last day of the Air ; and then referred to Edinburgh : each of them turned over the neglect upon another.

Some called for regratting and forstalling the mercats, and keiping up the vi&uall they had bought, to a dearth.—One is called for mastrupation ; and many for adulteries.—The Toune of Carraill in Fyffe is accused for making such an A&t as Hay of Woodcockdail made (*supra pag.* 296) in Lithgowshire, that no burgesse pershue before any other Court but ther oune.—One is clogged by the Affise of murder.

One Boog, tennent in Auchinreoch, having been delated, and produced a testificat under Sir W[illiam] Paterfon Clerk of the Counsell's hand that he had tane the bond *debito tempore* ; and yet refusing to promise not to rise in armes heirafter, was coney-catched, and condemned to be hanged : And to strick the more terror, sent before them to Glasgou, wher it was accordingly execut ; and publick intimation was made in the Court that Boog was not hanged for refusing the Test, (as the rumor was, put to fright others from compearing,) but for his being in the rebellion at Bothuel-bridge. The Justices would willingly have repreeved him, but they could not, but only the Privy Counsell :—yet they ware near as many Counsellors at Glasgou as might have made a *quorum* of the Privy Counsell ; only they would not attempt it without the Chancellor's consent.

At Glasgou, on the 10 and 12 of June, when they ware providing for Boog's execution, a controversie was started at Glasgou betuen the Magistrats of the Toune and Duke Hamilton's bailzie of the regality,

who should be at the expence; the Toune alledging they ware but a brugh of barony; yet in respect of the custome, the Magistrats ware burdened to prepare all necessaries; and wanting a hangman, they sent to Irving, 18 miles, for one.

Then a proclamation was made, inviting all to come in and inform against the 2 Lefmahago men, Macquhirrie and Smith, who, on the 8<sup>th</sup> of June last, killed Mr. Murray one of the King's guard, neir to Inchbelly-bridge, and wounded Mr. Ballantyne another of them, who ware carrieng one Smith, a prisoner for rebellion at Bothuel-bridge, from Edinburgh to Glasgow, to be judged their; with certification they shall be reputed conceallors of their treason and murder.

Then 2 small heritors, called Ruffells of Eistfeild and Windie-edge, and one Paterfon of Bothuel-sheills, and Hamilton of Raith, and Hamilton of Parkhead, ware forfaulted in absence; tho some of them ware proven to have been meerly in company with some of the rebels, without any armes at all, but only a staff in their hand; (see Mackenzie's Criminalls, page 66 and 340;) being this cannot be called rising against the King in armes: Yet the old word in our law "is rising in fear of weir," because tho unarmed, yet their multitudes cause fear to the King's party; and it's known that Generalls Montecuculi and Monck (the first throw infirmity, and the 2<sup>d</sup> because of an oath) never wore swords, yet, by their counsell, they ware more formidable and dangerous then others.

Some ware perswaded for treasonable speeches, and for furnishing meat and drink to the Bothuel-bridge rebels, when they possessed themselves of Glasgow, (which was partly extorted by force;) but this was thought to be all pardoned by the Duke of Monmouth's Indemnity in August 1679; tho Riddell, Provost of Rutherglen, having been accused of these crimes, the said defence was not minded to be proponed for him till after sentence was pronounced against him.

Many gentlemen in Clidfdale, who ware conveyed, as Lee, Orbiston, Walston, &c., took the Test, under protestation as no acknowledgement of guilt, but given as a testimony of their loyalty; and their on the dyet was deserted against them. This was considered as not sufficient by law to secure them; for the Justices are only impowered by the King's letter

and proclamation to indemnify the commons on ther taking of the Test, but not heritors. So that they may still be pershued, by raising new letters, and the declaring that no new letters shall be raised, will not debar the King's Advocat from insisting heirafter; so that a remission or new indemnity from the King for such who ather are guilty, or fear the forgery or impressiion of witnesses, is necessar for heritors, the Justices declaration being *ultra vires* as to them; especially, if they be of any note, or exceed 4 or 500 mks. by year. All courses ware set on foot to spread the Test, to make it as univerfall as the Covenant was, which it is to root out, and persuade all, ather as voluntiers or as criminalls, to take it; tho it be unwarrantable in law by this indirect way, without any law, to presse the Test, and study to make it generall.

This Circuit may be principally designed to reach and forfault gentlemen heirafter for conversing with, or resetting fugitives, who shall be now declared in this Court; and if they keep any heirafter, whosse names shall be printed; (but the tyme is now prorogued to March 1684;) and it was threatned by the King's Advocat and others, that it should be no excuse to put them of ther ground and land, but they should deliver them up to justice; yet the [4<sup>th</sup>] A& in 1681, anent the securing the peace, requires only removing them; but that speaks only of conventiculars, not of risers in arms. The fugitives that should be denounced at this Circuit ware ordained to be printed, that none, under the paine of treason, might harbor, converse with, or reset them after; like the *longa tabula Syllana* 3000 *equitum Romanorum proscriptorum* by Sylla, as Tacitus reports it, which is just our fugitive roll.

The forfaids Macquhirry and Smith ware condemned for being at Bothuel-bridge, for treasonable speaches, for burning the Test at Lanrick, and for accession to Mr. Murraye's affasinat; and had ther right hands cut of, then hanged and headed, and ther bodies hung up beyde the place of the murder in chains.—Then Maxuell of Boigton, and Maxuell of [Williamwood,] ware forfaulted in absence for accession to Bothuel-bridge.

At each place of the Circuit, a protection was openly proclaimed in Court from all debts during the Circuit, and 3 dayes after; and all mes-

fengers, under hyeft paine, difcharged to execute captions during that tyme, leift witneffes, under that pretence, be abftracted ; and fairs have this priviledge, *ergo* much more Circuits. Mr. Thomas Gordon, the clerk, for a&ts of caution and otherwayes, got much money, and took the manadgement of the Court mainly upon him, underftanding its formes better then any of the Judges ther, and being fupported with the Chancellor's favor. The freeholders in each diftri&t ware called : yet I think heritors, owing fute and prefence at Juftice Airts, may be abfent, and anfwer by a letter of attorney from the Chancery ; but wher lands are united, the baron himfelfe compears only in the fhire wher he dwells, or the lands'lyes to which they are united ; A& 95, Parliament 1503.

At this tyme, Gordon of Earlefton and one Atkin ware apprehended at Newcastle, and fent doune to Scotland, and feverall papers and commiffions taken on them. (See my Historick folio Manuscript at this tyme.)

*Item*, Andrew Gulan, weaver in Balmerinloch, one of the A. B. of St. Androis's murderers, is apprehended at Cockpen.

The laird of Houfton of that Ilk, having lands in Stirlingfhire, did anfwer ther at the calling of the fuit-rolls ; but protefted it fhould not oblige him as lyable, feing he dwelt in Renfrewfhire, to which thir lands in Stirlingfhire ware annexed.

No. 1012, 4 *Julij* 1683.—The English Phanatick-plot having broke out in England, we, to hold meafure to them in our Privy Counfell, emitted a proclamation for apprehending the Duke of M[onmouth] and Buccleuch, the Lord Gray, Sir William Armftong, and Mr. Robert Fergusfon, minifter, and the other confpirators.

2<sup>do</sup>. Ane A& is made, commanding Counfellors and Judges to attend ther places, and not to goe out of the kingdome without leive.

3<sup>do</sup>. Ther is ane A& anent the Mint, (*vide fupra pag.* 323) clofing it up till the Parliament fit, to give it new regulations ; and ordaining the Spanifh Ryalls of 14 drap weight, to paffe at 56 pence. Some merchands thinks this way of crying up and ferving ourfelves with forrain coin is an eafier way of furnifhing the country, (which cuftome Pole and fome other places ufes ; ) but it is not fo creditable.



10 *Julij* 1683.—The Criminall Circuit Court (*vide supra* p. 324, *et seq.*) <sup>No. 1013,  
p. 326.</sup> fits doune at Edinburgh, wher some thought it superfluous, it being the Justices ordinary residence : But Circuits as more splendid, stryke more aw, and ty themselves to fewer formes then the ordinary Courts.

Gulan, (*de quo supra* the beginning of this page,) as obstinat, is sentenced, and hanged on the 13 of July :—for this cheirfull and vain way some of thir fanaticks dy in, see *alibi* remarks from Origen ; see also *Menoch. de Arbitr. jud. Quæst. casu* 285, from the Milesian virgins ; and some in Tarquinius's tyme, who took a fancy of dying.

Edward Atkin (who long concealled and dissembled his name) is condemned of treason, on that narrow point of naked converse with, and harboring of, Gordon of Earleston, a forfaulted traitor. Tho they might have got farder heads against him, yet *ad terrorem* on this single ridge they would goe ; and his day set was the 20 of July, but prorogat. He being a commoner, his taking the Test by the King's qualified Indemnity, would have purged this ; but he did not offer it.

Thomas Somervell, taylor in Edinburgh, being called for treasonable resett, was imprisoned, because he did not offer to purge himselfe by the taking of the Test : tho he offered caution, and was ready instantly to abyde a tryall, yet the case being treason, and the King's Advocat not ready to insift against him, in respect he had not fully considered his probation, they refused bayll.

On the 14 of July 1683, the King's Advocat, and Sir John Sinclair of Lochend the party greeved, pershued Bailzie Kelly in Dunbar for opprefion of the liedges, in not suffering ther oune men to ship ther corne, &c., but forcing them to imploy the common Piners in ther toune, and exa&ting money for it. Alledged, It was a publick good ; for thesse Piners on this confideration kepted the harbory clean. The Lords continued it to November, and *medio tempore* discharged any such exa&tion.

24 *Julij*.—Ther is a letter from the King to the Criminall Court, discharging any procedor against the Earle of Brae[d]alban or Glenorchy and his sone, in that proces of treason, till farder order ; for he had come in will to the Duke of York :—afterwards he got a remission.

*Item*, Hamilton of Monkland is pannelled for treasonable converse with

the rebells at Bothuel-bridge when in armes ; tho he said it was only in feiking back a yong boy his sone :—he is forfaulted.

Ther is a motion in Counsell, that every Nobleman imprisoned in Edinburgh Castle shall pay for ther lodgings 50 lb. sterling, and every Gentleman 25 lb. sterling, tho they stay never so short tyme in.

2 *Augusti* 1683.—(To put all the Circuit together, without interjecting the Privy Counsell affairs :) Lockhart of Bankhead, and Broun of Duncanemor in Kylemuir in Carriēt, having been found guilty at the Circuit Court of Air upon probation by ane Affise ; they ware this day condemned of treason.

About and before this tyme, many gentlemen ware imprisoned as panelled for refett, and declining to purge themselves by taking the Test. Sir Robert Sinclair of Stevinson, Cockburne of Ormiston, Hepburne of Blackcastle, Bailzie of Laminton, Shaw of Greinock, and Sir Daniel Carmichell of Mallefly, and Maxuell of Newark, are put in the Castle : Ramfay of Idington, Hamilton of Aikenhead, and many other gentlemen, (for noblemen ware not taken up in this Porteous, but reserved for another tyme,) ware disperfed up and doune the prisons of Edinburgh. Cannogate, Leith, Hadington, &c. ; and, to show ther impartiality, 3 Popish lairds, Hamilton of Hags, Muirhead of Lauchop, and Glendynning of Parton, ware also imprisoned for refusing the Test ; but on the 7<sup>th</sup> of August, they, forfooth, ware liberat, as loyall persons at Counsell.

*Eodem tempore*.—A new Commiffion is ifhued out by the Privy Counsell, to take farder tryall by a præcognition throw all Scotland, what may be got proven by witnesfes againft any already in prifon, or againft any others that ware not delated, nor given up in the former Porteous roll : which will be the 2<sup>d</sup> crop of advantage to Mr. Gordon the clerk.

*Item*, The Lady Longformacus being pershued for refetting of Rebells, and it being alledged for hir, that shee lived at Berwick ; the Criminall Lords ordained hir to find caution to live orderly when in Scotland, under the paine of 3000 mks., or else to remove out of Scotland never to returne without the King's speciall licence. And this course they took with other weemen pershued, because they could not put them to take the Test.

*Item*, Seven of the Indulged Minifters being pannelled for breaking ther

instructions, in preaching without ther bounds, or against the Test ; 5 of them ware continued under caution to the 1 of December ; and the 2 other, viz., Mr. John Weitch, once at Weststruther, and Mr. Anthony Shaw, at [Newmills], ware incarcerat, becaufe ther guilt seemed greater then that of the rest.

*Item*, Alexander Martin, wryter in Duncce, is conveened before the Criminall Court for 11 severall articles of falsehood, cheatry, malversation, and oppreßion : as exacting 28 lb. Scots of charges for lifting 40 shilling Scots of cesse ; for causing witnesses subscribe before they saw the principall party signe it, [&c.]

Severall gentlemen who had been sent to prison for not offering to purge ther suspition of guilt by taking the Test, are freed on caution to appear in November or December, at the Justice Court, and are confined, some to Edinburgh and a mile about, and some to Kelfo and else-where.—Ormiston, Stevinson, &c., who ware in the Castle, are liberat upon a deserting of the dyet against them, in regard the probation was not full. But ther was rounge left to the King's Advocat to insist against them before the Privy Counsell, for a fyne to be imposed on them, for ther negligence in not purging ther lands of rebels.—Then the Chancellor made a 3<sup>d</sup> classe or category, as Idington, David Ofuald, &c. ; that on the old probation, or the præcognition and additionall commiſſion, ther guilt was found more deep then others, as to the resetting and harboring ; and therfor they ware left in prison some tyme behind the rest ; treason of it selfe not being a baylable cryme : yet at last they ware all set at liberty on caution.

At this tyme, Douglas of Bonjedbrugh is fyned by the Laird of Meldrum, as the Counsell's Shireff of Teviotdale, for his oune and his Ladie's irregularities in absences from the Church, in privat baptismes, &c., in 27,500 mks. : And Sir William Scot of Harden for the like faults, in 46,000 lb. Scots : which are waſt ſummes of money. But Harden meaning himselfe to the Counsell, he is heard on the 16 of August, and alledged, 1<sup>o</sup> Upon a discharge granted to him by the Earle of Home, and his deputies as Shireffs of the Merſe. The Lords finding it colluſive, and far within the fyne impoſeable on him by the Acts of Parliament, they ſuf-

tained it to exoner him so far as he had payed of it to them, but no farder. 2<sup>da</sup>. He alledged the A&ts of Parliaments in 1670 and 1672, imposing fynes on absents from the Church, did not declare husbands liable for ther wives, as the a&ts of thesse Parliaments against Conventicles did; without which be expressly insert in the a&t, he cannot be liable for his wife's withdrawing. Yet notwithstanding, the Lords ordained him to depone on the libell. Afterwards he was liberat out of the Castle on caution, but confyned to Edinburgh.

No. 1014, 12 *Julij* 1683.—At Privy Counsell, Thomas Hamilton, merchand in p. 327. Edinburgh, gets the sole priviledge and gift of making beaver hats for 9 years to come.

No. 1015, 2 *Sextilis vel Augusti* 1683.—Several merchands of Edinburgh being p. 327. pershued at Privy Counsell for venting prohibited goods; they alledged, They had not imported them, but only bought them from importers, or others who had them besyde them, before the manufactory and prohibitorie A& was made. The Lords inclined to find, tho men might buy such things for ther oun use and wearing, yet that merchands might not buy them to retails and sell out again. Likeas, some of them had given them up in inventar, (as was appointed by the A& in Aprill 1681,) and they had not been pershued within 3 moneths, as that A& præscrieves. Ther was ane A& of Secret Counsell made on this.

2<sup>da</sup>. One Duncan pershues Brown of Gorgie-milne, for violent ejecting him out of a milne, wheirof he had a tack for years yet to run, and wheiron he had taken ane instrument against him. The Lords fand his libell relevant, and admitted it to probation.

3<sup>da</sup>. Monkland and Aitkin repreeved for a tyme.

4<sup>da</sup>. The Counsell at last takes of William Cockburne merchand his banishment out of Lothian, tho Oxenford opposed it all he could. It had stood 9 years. (See it *alibi* in the end of 1674.)

No. 1016, 7 *Augusti* 1683.—The King's printed Declaration anent this late p. 328. Phanaticall-plot was red in our Privy Counsell, and a thanksgiving

appointed on the 9 of September throw all Scotland (the same day is also set in England) for its discovery ; and his Declaration to be read throw all the Churches. They would not make it on a week-day, lest the people might have withdrawn and absented themselves from it.

16 *Augusti* 1683.—At Privy Counsell, ther are 2 severall complaints No. 1017,  
p. 328. exhibited against the Toune of Edinburgh ; the one by the Officers of the Mint, and some smiths, tailzeors, wrights, and other tradfmen depending on it. The 2<sup>d</sup>, by the Incorporation of the Silkweavers ther, bearing, That by his Majestie's gifts and the Acts of Parliament, they were exeemed from all cesses and publick burdens, and from watching, wairding, and going furth in the militia, and from Ministers annuities and stents ; and yet they ware poinded by the Toune's collectors, without regard to ther priviledges.—The Counsell fand the officers and servants of the Mint had ane exemption ; and [that] the Silk-weavers ware a priviledged manufactory ; yet they sustained the Toune's defence, by which they offered them to prove, that they exercised other trades, and keiped chops [shops] as cooks, or for ale and brandee, &c., within the Toune, for which they ought to bear burdens ; and referred this to ther oaths. (*Vide infra.*)

2<sup>do</sup>. Sir William Scot of Harden's cause was heard, (*de quo supra.*)

3<sup>do</sup>. Helen Ramsay, reli&t of James Aikenhead apothecary, pershues Sir Patrick Hepburne of Blackcastle, for wounding and beating hir, in the ejecting hir out of hir chop [shop]. Alledged, The ejection was legall, by vertue of a decreet of removing obtained against hir by Sir Patrick : but as to the ryot of beating, denyes it, tho shee gave them very opprobrious language. Hir libell was admitted to probation ; but the ryot seemed rather to ly in the unseasonableness of the ejection, it being under the cloud of night, about 11 a'clock.

4<sup>th</sup>. The Parliament is prorogued by a letter from the King, and a proclamation, from the 17 of Jully, on which it should have mett, to the 6<sup>t</sup> of December nixt. It was doubted if it was not extinct, by suffering the day to passe without meeting, or a new prorogation then : it was meer forgetfulness ; but this may yeeld a cavill to question what shall hereafter passe in this Parliament.

5<sup>th</sup>. The printed proclamation mentioned in the preceding page comes furth against the Merchands, who, under the pretence of exchanging prohibited commodities with others, did continue to sell them, which is declared as unlawfull as if they had imported them : it also commands them to give up faithful inventars.

6<sup>th</sup>. Skeen of Halzeards in Fyffe complains upon one James Dewar for flandering him : (see it *supra* pag. 324 :) he not appearing, is ordained to be apprehended and imprisoned, and thereafter to crave him pardon at the Shiref Head-court.

7<sup>th</sup>. Mr. James Ogilvy, 2<sup>d</sup> son to the Earle of Finlater, pershues Sir Robert Hepburne of Keith's reli&, at Privy Counsell, for exhibiting Sir Robert's latter will, and other wryts abstracted by hir, wheirby he had left legacies, and considerable summes of money to him. Shee is ordained to depone.

8<sup>th</sup>. On a complaint given in by my Lord Lithgow, and Leviston his sone, against the Toune of Lithgow, and Alexander Milne ther Proveft, and the other Magistrats, that they ware slack, negligent and remisse in putting the Ecclesiastick laws to execution, as to Conventicles, absents from the Church, rebels, and ther refetters : The Lords of Counsell named and gave commiffion to the Bischop of Edinburgh, and my Lord Abotshall, to goe to Lithgow, to try the matter of fact, and to report.

No. 1018, *Eodem tempore*.—Gordon of Earlestone is brought to the bar of the  
p. 328. Criminall Court, and the sentence of forfaitor and death, formerly pronounced against him, is red to him, and the tyme of his execution is prefixed to him, viz., the 28 of September nixt : But ther came a letter from the King, proroguing the tyme, and appointing him to be put in the boots anent his complices, he having been hitherto very disingenuous. The Counsell wrot back to the King, that it was not very regular to torture malefactors after they ware condemned to dy, but only before convi&ion. He attempted to escape, but was hindred.

No. 1019, 3 *Septembris* 1683.—Mr. John Dick, sone to David Dick wryter in  
p. 328. Edinburgh, a Carguellian, being apprehended, is pannelled before the

Criminall Court, and, on his oun confeffion, is found guilty by the Affife, of being at Bothuel-bridge, and of treasonable ouning theffe rebellions, and of adhæring to Welfch, and the Covenant, with great obftinacie. He is sentenced to be hanged at the Graffe Mercat, on the 26 of September nixt. (*Vide infra* more, the nixt page.)

11 *Septembris* 1683.—At Privy Counfell, one Bailzie Birfbane, with the No. 1020,  
p. 328. Magiftrats of Air, and one Bailzie Wallace, have mutuall complaints one againft another, anent the choifing of the Counfell of the faid Brugh for the year infhueing. The Counfell ordained each of them to give in lifts of fuch as they judged fit; and declared, they would choife out of the 2 lifts.

2<sup>da</sup> The Toune of Lithgow's affair (*de quo superiore pag.*) being reported, the Counfell fand the Toune negligent, and therfor rebuked Proveft Milne; and gave a cumulative jurifdiction to my Lord Levifton to goe over the inhabitants delinquents again, and to fweep cleaner.—Ther was alfo this day a conteft betuen Kennedy, Proveft of Stirling, and old Proveft Ruffell.

3<sup>th</sup> The Toune of Edinburgh having neglected to take out ther diligence about the Silk-weavers and Mint-men, (*vide præcedentem pag.*) for proving ther defence, they by a bill declared they would refer it to ther oaths; which the Counfell admitted of.

4<sup>th</sup> Earleſton gets a repreive to the 2<sup>d</sup> Fryday of November, that in the mean tyme he might deall for a remiffion; but they refused David Dick's bill for his ſone, craving a commutation of the puniſhment to baniſhment, &c.

5<sup>th</sup> The Toune of Edinburgh having given in a bill, craving liberty to uplift the fynes they had impoſed upon ther burgefſes for abſence from the Church, &c., tho the Hy Treafurer acclaimed the fynes of fuch of them as ware heritors, conforme to the [5<sup>th</sup>] A& of Parliament in 1670: but the Toune alledged, Heritors moſt be underſtood, of heritage lying in landwart, not of heritors or landlords within brugh, who hes but a chop, it may be. The Privy Counfell laid the confideration of this aſide till November.

6<sup>th</sup> Miſtris Telfer, the printer, gave in a complaint againſt John Reid,

who, contrare to his bond, had set up a printing house. Alledged, 1<sup>o</sup> He had a licence from his son, who had right to that gift of printing. 2<sup>da</sup> His gift as exorbitant was restricted, in the late debate between him and David Lindsay, (*supra pag.* 286,) to what was in Evan Tylor's gift in 1641, and no farther. The Privy Counsell discharged John Reid to print till he fand caution in ther books that nothing should passe his irons, till first licenced and allowed; and then permitted him to print any thing not given away to the King's Printer, by Evan Tylor's gift, to which they restri& his's. And as to his contraventions, and the discharge he founded on, fand that a civill point, and referred them to ther declarators and reductions theranent before the Session.

*Eodem tempore.*—One Wander Heyde, a Dutchman, is apprehended for coyning false mark pieces, wher the stamp was very exactly counterfyted.

No. 1021, 15 *Septembris*.—At night, Mr. John Dick (*de quo pag. præcedente*)  
p. 329. and 22 mo prisoners broke the Tolbooth of Edinburgh, and escaped out of a window by ropes, having cutted the iron stanchells: 2 or 3 of them ware in only for civill debts; the rest, as Aitkin, Lapsley, (*de quo supra* 7 *Octobris* 1681,) and the 2 dragouns who killed Seton of Carrifton's son, ware in for crymes, and some of them shortly after to be hanged.

No. 1022, 20 *Septembris* 1683.—The A& of Counsell on the King's letter is made,  
p. 329. prorogating the dyet of taking the Test to some of the commons for a longer tyme, and indemnifying such heritors as had tane it *quoad* ther life, reserving power to infist against them for a fyne.

No. 1023, 24 & 25 *Septembris* 1683.—A Committee of the Privy Counsell was  
p. 329. called extraordinary, to intimat to the Magistrats of Edinburgh the King's pleasure send doune to them by a letter of Midleton his Secretary, recommending to the Toune Counsell to choise Bailzie Drummond Proveft, as ane disintereffed person, till the counts of the misapplication of the Toune's common good be cleared before the Exchequer; (*vide supra pag.* 319,) and annulling Sir James Rocheid's taking in James Hamilton as his conjun& in the Clerkship. This letter (with the strenth of the



byasse and genius of the Toun against them) broke Rocheid and Kinloch's party in the Toun Counsell. Wheiron Sir James Fleeming then Proveft, to get in Bailzie Crawford and others of ther oun faction the inshueing year, made ane a&t, that whoever refused to accept ane office, should pay 500 lb. sterling of fyne. But so soon as Drummond was chosen Proveft, he rescinded this A&t, and got in Bailzies of his oun desiring; and made 2 a&ts to please the Trades and Toun: the one was, taking away the sentence money from the Clerk, and applying it (as is expected) to pay the guard or watch-money *pro tanto*, to ease the neighbours of that celfe. 2<sup>da</sup>. That the Toun Counsell shall ever heirafter give out the Trades 3 of ther oun 6 that they give in, that out of thesse 3 the Trades may choise one of them to be ther deacon. This conceffion abridges the Merchands power much, and gives away, to please the Trades, a great jewell, by which they sometymes overawed the Trades: for when the Merchands did not like any of the Trades 6, they gave them out 3 which was none of them. Nather was this contrare to King James his Set or Decreet-arbitrall. 3<sup>da</sup>. The A&t made in 1675, discharging Clerks to meddle in elections, rescinded by Rocheid, was now revived against him. 4<sup>ta</sup>. That no weemen serve in taverns or low cellars; because it occasions much uncleanness. This was not put in execution, because they ware feid for this year coming, before the A&t was made; but they promised to observe it the next year. The caulsey whoores were trapped by the officers pretending themselves sojors, and ware imprisoned. Thus new Lords bring in new laws; and insensibly the Toun of Edinburgh hes the liberty of ther free elections incroached on without much clamor, because in this particular it went with ther oun inclinations. However, this and former precedents may lay a foundation and preparative for assuming the government of Edinburgh, (and consequently of the other Burrows royall in Scotland,) without a *quo warranto* decree, which he was put to in London; all which are inlets to &c.; but the King will be most just.

*Eodem tempore.*—A new letter from the King is red about the signator No. 1024, of Argile's estate, (*vide supra* pag. 320) and division of his forfaultor, <sup>p. 330.</sup>

stopping it till farder order. Some thinks it's to take away what was given to my Lord Lorne, and the other children; the King not thinking it fitt to keep up any memory or representative of this family; seing it appears Argyle hes been in this last plott. Yet ther *jus quæsitum* by the signator cannot be recalled, nor Lorne deprived of what he was provided to by his contract of marriage, and which was confirmed before his Father's treason. Yet the anterior creditors being let louse, may reduce Lorne's right on the A& of Parliament in 1621 as *inter conjunctos*, &c. *Quæritur*, If what be taken from the children will be given to the creditors to help them?—Some talk the King will purchase Kintyre, and give it to Prince George and his neice: Others spoke of Orkney and Shetland, and to creat him Duke of it; which title Bothel Hepburne got from Queen Mary his wife: but that was thought not politique; for that might re-annex them sometyme again to Norrway and Denmark, to which they once belonged and ly nearest; which might mar our trade exceedingly.

No. 1025,  
p. 330.

10 *Octobris* 1683.—The Synod of Edinburgh sat doune, and not having much else adoe, enacted, 1<sup>a</sup> That Minifters should not sit in the pulpit, but stand all the tyme they are in it. 2<sup>a</sup> Shall *per expresse* pray for the Arch-Bischops and Bischops. 3<sup>a</sup> Shall in praying for the King mention his being Supream head of the Church, in all causes, and over all persons. 4<sup>a</sup> Who ever used Le&ures shall forbear them. 5<sup>a</sup> They shall cause to sing the Doxology [at] both the dyets of sermon. 6<sup>a</sup> They shall desire the people to stand to the prayers, and not to sitt. 7<sup>a</sup> A complaint being made, that the Indulged Minifters the thanksgiving day, on the 9<sup>t</sup> of September last, did not speak clearly that ther was any reall Plot; the Bischop told them, it belonged to the Privy Counsell to censure that.<sup>1</sup>

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<sup>1</sup> See a Continuation of thir Observes and Decisions of the Lords of Session in another folio Manuscript like this, but of 6 quaires, and marked with the letter and figure A. 13; which begins with November 1683, and the following moneths of that Winter Session; which I began ther, because the remaining leives of this book would not have been able to contain that wholle Winter's Decisions, it not being fit to divide it in two books: And which volume [the Author has afterwards added] carries on the Decisions to the Revolution in November 1688, by the space of 5 years.









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